SHELBY COUNTY CRIMINAL

STATE OF TENNESSEE,
APPELLEE

VS. 97-02817,
98-01033, 34

TRANSCRIPT OF THE RECORD

MICHAEL D. RIMMER,
APPELLANT

(T.D.O.C.-INDIGENT)

VOLUME 1 OF 14 VOLUMES

TDOC # 110874 - Michael Rimmer
Location Riverbend Max. Security
Bail Amount
Indigency Status Indigent
Add'l Info DEATH PENALTY

CRIMINAL COURT OF SHELBY COUNTY

W. FRED AXLEY
WILLIAM R. KEY - CLERK

STATE OF TENNESSEE,
APPELLEE

VS. 97-02817, 98-01033, 34

TRANSCRIPT OF THE RECORD

MICHAEL D. RIMMER,
APPELLANT

(T.D.O.C.-INDIGENT)

MR. A C WHARTON, PUBLIC DEFENDER, CRIMINAL JUSTICE COMPLEX, SUITE 201, 201 POPLAR AVENUE, MEMPHIS, TENNESSEE 38103

FOR APPELLANT

MR. THOMAS HENDERSON, ASSISTANT ATTORNEY GENERAL, CRIMINAL JUSTICE COMPLEX, SUITE 301, 201 POPLAR AVENUE, MEMPHIS, TENNESSEE 38103

FOR APPELLEE

FILED 29 DAY OF July, 19 99.

MS. SUE WALKER, CHIEF DEPUTY CLERK
COURT OF CRIMINAL APPEALS

BY: M. Walker

CONTENTS

	PAGE #
AFFIDAVIT OF INDIGENCY	6
APPELLANT'S FILING OF TRANSCRIPT & NOTICE OF FILING	279
APPLICATION FOR PERMISSION TO APPEAL PURSUANT TO RULE 10	179-182
ARRAIGNMENT-APPOINTMENT OF THE PUBLIC DEFENDER	7, 13
BILLS OF INDICTMENT	1-3, 8-12
CAPIAS (NOT IN CUSTODY)	4, 5
MEDIA LETTER REQUESTING COVERAGE OF TRIAL	184, 209
MOTION FOR DISCOVERY	14-16
STATE' S RESPONSE	17-19
HEARD AND COMPLIED WITH	170
MOTION TO SET AND DISPOSE OF MOTIONS PRIOR TO TRIAL	20, 21
HEARD AND GRANTED	170
MOTION TO REQUIRE THE STATE TO ANNOUNCE WHETHER IT INTENDS TO SEEK THE DEATH PENALTY	22, 23
STATE' S RESPONSE	24-26
HEARD AND GRANTED	170
MOTION FOR NOTICE OF STATE' S INTENTION TO USE EVIDENCE	27, 28
MEMORANDUM IN SUPPORT THEREOF	29, 30
STATE' S RESPONSE	31
HEARD AND RESERVED	170
MOTION FOR WITNESS STATEMENTS	32, 33
MEMORANDUM IN SUPPORT THEREOF	34, 35
STATE' S RESPONSE	36
HEARD AND DENIED	170
MOTION FOR DISCLOSURE OF IMPEACHING INFORMATION	37, 38
STATE' S RESPONSE	39, 40
HEARD AND GRANTED	170
MOTION FOR PRODUCTION OF EXCULPATORY EVIDENCE	41-44
MEMORANDUM IN SUPPORT THEREOF	45-48
STATE' S RESPONSE	49, 50
HEARD AND GRANTED	170
MOTION TO DISMISS THE INDICTMENT DUE TO THE ILLEGALITY AND UNCONSTITUTIONALITY OF T.C.A. 39-13-204 & 39-13-206	51-53
MEMORANDUM IN SUPPORT THEREOF	54-87
HEARD AND DENIED	170

MOTION FOR INDIVIDUAL VOIR DIRE 88, 89
BRIEF IN SUPPORT OF MOTION 90-95
STATE' S RESPONSE 96, 97
HEARD AND RESERVED 171

MOTION OF THE ACCUSED TO REQUIRE COURT TO CHARGE PRESUMPTION OF LIFE SENTENCE, LIFE WITHOUT POSSIBILITY OF PAROLE, AND DEATH SENTENCE 98, 99
STATE' S RESPONSE 100
HEARD AND DENIED 171

MOTION FOR ARREST HISTORIES OF ALL POTENTIAL STATE WITNESSES 101, 102
STATE' S RESPONSE 103, 104
HEARD AND TAKEN UNDER ADVISEMENT 171

MOTION FOR SEPARATE JURIES 105, 106
STATE' S RESPONSE 107
HEARD AND DENIED 171

MOTION FOR A PRE-TRIAL MORGAN HEARING 108, 109
STATE' S RESPONSE 110
HEARD AND DENIED 171

MOTION TO REQUIRE LIST OF STATE' S WITNESSES IN THE SENTENCING STAGE OF THE TRIAL 111, 112
STATE' S RESPONSE 113
HEARD AND GRANTED 171

MOTION TO COMPEL DISCLOSURE OF AGGRAVATING CIRCUMSTANCES 114, 115
HEARD AND GRANTED 171

MOTION TO REQUIRE STATE TO FILE WRITTEN RESPONSE TO PRE-TRIAL MOTIONS 116
HEARD AND COMPLIED WITH 171

MOTION FOR THE PRODUCTION OF POLICE REPORTS 117, 118
STATE' S RESPONSE 119
HEARD AND DENIED 171

MOTION IN LIMINE-PHOTOGRAPHS OF THE DECEASED WHILE ALIVE 120, 121
STATE' S RESPONSE 122
HEARD AND RESERVED 171

MOTION TO DISMISS ON THE GROUNDS THAT ELECTROCUTION CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT 123
MEMORANDUM IN SUPPORT THEREOF 124-131
STATE' S RESPONSE 132
HEARD AND DENIED 171

MOTION TO SUPPRESS STATEMENTS 133
STATE' S RESPONSE 134
HEARD AND RESERVED 171

MOTION TO SUPPRESS EVIDENCE 135
HEARD AND WITHDRAWN 171

MOTION TO INSPECT GRAND JURY, OR IN THE ALTERNATIVE, MOTION TO DISMISS 136
STATE' S RESPONSE 137, 138
HEARD AND GRANTED 171

MOTION FOR BILL OF PARTICULARS 139
STATE' S RESPONSE 140
HEARD AND DISMISSED 171

MOTION TO DISMISS 141
STATE' S RESPONSE 142-144
HEARD AND DENIED 171

MOTION FOR FUNDS FOR PROPORTIONALITY STUDY 145
STATE' S RESPONSE 146
HEARD AND DENIED 171

MOTION FOR COURT TO INSTRUCT THE JURY, DURING THE PENALTY PHASE OF THE TRIAL, THAT IT MAY CONSIDER SYMPATHY, BASED UPON THE EVIDENCE, IN REACHING ITS VERDICT 147, 148
MEMORANDUM IN SUPPORT THEREOF 149-156
STATE' S RESPONSE 157, 158
HEARD AND DENIED 172

MOTION RESERVING THE RIGHT TO FILE ADDITIONAL MOTIONS 159
STATE' S RESPONSE 160
HEARD AND GRANTED 172

MOTION FOR NOTICE OF ALIBI DEFENSE 161
HEARD AND GRANTED 172

MOTION OF THE STATE FOR NOTICE OF DEFENSE BASED ON MENTAL CONDITION 162
HEARD AND GRANTED 172

MOTION FOR NOTICE OF AND SEALED TRANSCRIPTION OF DEFENDANT' S EX PARTE HEARING ON REQUEST FOR EXPERT OR INVESTIGATIVE SERVICES 163-165
HEARD AND GRANTED 172

MOTION OF STATE FOR COMPLIANCE WITH VICTIM' S BILL OF RIGHTS 166, 167
HEARD AND GRANTED 172

MOTION OF THE STATE TO DISMISS WITHOUT EVIDENTIARY HEARING THE MOTION OF DEFENDANT TO SUPPRESS EVIDENCE 168

MOTION TO CONTINUE 173-176
STATE' S RESPONSE 177
HEARD AND DENIED 178

MOTION TO APPEAL (ORAL)
HEARD AND GRANTED 178

MOTION OF STATE TO CONSOLIDATE (ORAL)
HEARD AND GRANTED 200

MOTION OF STATE OF PROOF OF MOTIVE BY PRIOR CRIMES
MEMORANDUM IN SUPPORT THEREOF 187-189
HEARD AND GRANTED 200

MOTION OF STATE ON PROOF OF GUILTY KNOWLEDGE BY PROOF OF ESCAPE AND ESCAPE ATTEMPTS
MEMORANDUM IN SUPPORT THEREOF 190, 191
HEARD AND GRANTED 200

MOTION TO PRECLUDE SHACKLING OF DEFENDANT 192-199
HEARD AND DENIED 200

MOTION TO WAIVE THE RIGHT TO HAVE A JURY DETERMINE PUNISHMENT, IN WHICH CASE THE JUDGE SHALL DETERMINE PUNISHMENT 210

MOTION FOR WITHDRAWAL AND NEW APPOINTMENT OF COUNSEL 246-249
STATE' S RESPONSE 250
DEFENDANT' S REBUTTAL RESPONSE 251, 252
ORDER DISMISSING 274

MOTION TO OBTAIN A FREE COPY OF THE TRIAL TRANSCRIPT 253-255
STATE' S RESPONSE 256
DEFENDANT' S REBUTTAL RESPONSE 257
ORDER DISMISSING 274

MOTION TO AMEND MOTION FOR NEW TRIAL 258-266
STATE' S RESPONSE 267
DEFENDANT' S REBUTTAL RESPONSE 268, 269
ORDER DISMISSING 274

MOTION FOR STAY OF EXECUTION 271
ORDER GRANTING 272

MOTION FOR SUBPOENA OF WITNESSES FOR HEARING ON PRESENT MOTIONS 275

MOTION TO VACATE ORDER OF DISMISSAL IN ERROR ON MOTION TO AMEND MOTION FOR NEW TRIAL, MOTION FOR FREE TRIAL TRANSCRIPT, AND MOTION TO WITHDRAW AND APPOINT NEW COUNSEL 276-278

MOTION FOR POWER TO CONSIDER POST-JUDGMENT FACTS PURSUANT TO RULE 14 280-289

NOTICE OF APPEAL 270
NOTICE OF IMPEACHMENT CONVICTIONS 169
NOTICE OF INTENT TO SEEK ENHANCED PUNISHMENT 214

ORDER:
DENYING EXTRAORDINARY APPEAL (CCA) 183
REGARDING MEDIA GUIDELINES 185, 186
GRANTING EXTENSION OF TIME TO FILE TRANSCRIPT (CCA) 273
APPROVING DELAYED TRANSCRIPT OF EVIDENCE 290

TRIAL (PLEA OF NOT GUILTY):
JURY VERDICT 200-208, 211, 212
FINDING OF FACT 226-233
JUDGMENT OF THE COURT (SENTENCING) 213, 224, 225

MOTION FOR NEW TRIAL:
WRITTEN MOTION FOR NEW TRIAL 215-218
STATE' S RESPONSE 219-223
ORDER OVERRULING MOTION FOR
NEW TRIAL (97-02817, 98-01033) 234
ORDER DENYING MOTION FOR NEW TRIAL (98-01034) 235-245

STATE OF TENNESSEE) CRIMINAL COURT OF SHELBY COUNTY
)
SHELBY COUNTY) JANUARY TERM, 1997

Count 1

THE GRAND JURORS of the State of Tennessee, duly selected, empaneled, sworn and charged to inquire for the body of the county of Shelby, Tennessee, upon their oath, present that:

MICHAEL D. RIMMER

during the period of time between January 3, 1997 and March 6, 1997, in Shelby County, Tennessee, and before the finding of this indictment, did unlawfully and knowingly obtain property, to wit: a motor vehicle, all over the value of one thousand dollars but under the value of ten thousand dollars of the proper goods and chattels of HOWARD S. FEATHERSTONE, JR. without the effective consent of HOWARD S. FEATHERSTONE, JR. with intent to deprive the owner thereof, in violation of T.C.A. 39-14-103, against the peace and dignity of the State of Tennessee.

District Attorney General
30th Judicial District

STATE OF TENNESSEE) CRIMINAL COURT OF SHELBY COUNTY
)
SHELBY COUNTY) JANUARY TERM, 1997

Count 2

THE GRAND JURORS of the State of Tennessee, duly selected, empaneled, sworn and charged to inquire for the body of the county of Shelby, Tennessee, upon their oath, present that:

MICHAEL D. RIMMER

during the period of time between January 3, 1997 and March 6, 1997, in Shelby County, Tennessee, and before the finding of this indictment, did unlawfully and knowingly exercise control over property, to wit: a motor vehicle, all over the value of one thousand dollars but under the value of ten thousand dollars of the proper goods and chattels of HOWARD S. FEATHERSTONE, JR. without the effective consent of HOWARD S. FEATHERSTONE, JR. with intent to deprive the owner thereof, in violation of T.C.A. 39-14-103, against the peace and dignity of the State of Tennessee.

District Attorney General
30th Judicial District

A.G. FILE # Z9213

NO. 97-02817

STATE OF TENNESSEE

Indictment for

T.C.A. 39-14-103
T.C.A. 39-14-103

Theft (SCATS - 21039)
Theft (SCATS - 21039)

VS.

MICHAEL D. RIMMER

WITNESSES:
Summon for State

T.J. HELLDORFER, MPD, HOMICIDE BUREAU
HOWARD S. FEATHERSTONE,JR, 1635 WALTER ST.

T.J. HELLDORFER
Prosecutor

A TRUE BILL

M B Rhett
Foreman of the Grand Jury

Date Indictment Returned: 3/6/97

S T A T E O F T E N N E S S E E

To All Sheriffs of State of Tennessee- GREETING;

You Are Hereby Commanded to take the body of
MICHAEL D. RIMMER

If to be found in your County, and him safely keep, so that you have him before the Judge of the Criminal Court of Shelby County, at a term of said Court, to be held for the County of Shelby, at the Court House in Memphis, then and there answer the State of Tennessee, on a TRUE Bill of Indictment, against him for
THEFT OF PROPERTY OVER $500 39-14-103 97 02817
Hereinfail not and have you then and there this Writ.
WITNESS, William R. Key , Clerk of said Court, at office, in Memphis.

William R. Key ,Clerk

D.C.

97 NOV -2 AM 8:08
SHERIFF SERVICE
CRIMINAL COURT
CLERK'S OFFICE

97 NOV -5 PM 6:08
CHRIS TURNER
24 HOUR SERVICE

CN
DIV. 06
A.G. Z9213
R&I 000058159

BOND SET AT 0.00

WILL EXTRADITE BY: AG/CM
NO BOND SET

==========

NO. 97 02817

==========

S T A T E O F T E N N E S S E E

vs.

C A P I A S

MICHAEL D. RIMMER 97607288
AKA MICHAEL RIMMER CR-97007548
M W 03/13/1966
IN JAIL
JOHNSON COUNTY IN 00000 0000
SSN 310-70-5371

==========

Issued 07 day of MARCH 1997

Came to hand ____ day of _____

Defendant arrested 5 day

of NOV, 97

and PLACED IN JAIL

A. C. Gilless
Sheriff Shelby County

By _____ 1609
Deputy Sheriff Shelby County

97 NOV -5 PM 6:08
CHRIS TURNER
24 HOUR SERVICE

97 NOV -5 PM 6:08
CHRIS TURNER
24 HOUR SERVICE

mer, Michael DEFENDANT _____ DOCKET # 9705641?

UNIFORM AFFADAVIT OF INDIGENCY

Comes the defendant, and subject to the penalty of perjury, makes an oath in the following facts (places, lists, and income.) PLEASE FILL OUT COMPLETELY.

PART I

1. Full Name: Michael Rummel 2. Social Security Number: 310-70-5371
3. Any other names used None 4. Birthday: 3-13-62
5. Telephone no: (Home): NA (work) NA (other) NA
6. Are you working anywhere? NO (X) YES ( )
   WHERE? NA
7. How much money do you make? None
8. Do you receive any government assistance or pensions? (Disability, SSI, AFDC, etc)
   Yes( ) No(X) What is its value? _____
9. Do you own any property? (House, car, bank acct, etc.) Yes( ) No(X)
   What is its value?
10. Are you or your family going to post your bond? Yes( ) No(X)
11. Are you or your family going to hire a private attorney? Yes( ) No(X)

(If the defendant is in custody, unable to make bond and answers questions one (1) through eleven(11) make it clear that the defendant has no resources to hire a private attorney, skips part II and complete part III. If part II is to be completed, do not list items already in part I.)

PART II

12. Names and ages of ALL dependants: _____ Relationship _____
    _____ Relationship _____
    _____ Relationship _____
13. I have met with the following lawyer(s), have attempted to hire said lawyer(s) to represent me, but unable to: Name _____
    Address _____
14. All my income from all sources (including, but limited to, WAGES, INTEREST, GIFTS, AFDC, SSI, SOCIAL SECURITY, RETIREMENT, DISABILITY, PENSION, UNEMPLOYMENT, ALIMONY, AND WORKMANS COMPENSATION, ETC..)
    $_____ PER _____ FROM _____
    $_____ PER _____ FROM _____
    $_____ PER _____ FROM _____
15. All money available to me from other sources: A. CASH _____
    B. Checking, Savings, or CD account(s): _____
    Give bank acct number and Balance _____
    C. Debts owed me: _____
    D. Credit Card(s)..give acct number, balance, credit limit, and type of card (Visa, MasterCard, AmericanExpress, Etc.) _____
    E. Other: _____
16. All vehicles/vessels owned by me, solely or jointly, within the last Six months (including but not limited to cars, trucks, motorcycles, farm equipment, boats, etc...):
    _____ value$ _____ amt owed$ _____
    _____ value$ _____ amt owed$ _____
17. All real estate owned by me, solely, or jointly, within the last Six months (including, but not limited to Land, lots, houses, mobile homes, etc...):
    _____ value$ _____ amt owed$ _____
    _____ value$ _____ amt owed$ _____
18. All assets or property not already listed, owned in the last Six months or expected in the future:
    _____ value$ _____ amt owed$ _____
    _____ value$ _____ amt owed$ _____
19. The last Income Tax Return I filed was for the year _____ and it reflected a net income of $_____
    I will file a copy of same within the week if required.
20. I am out of jail on bond of $_____ made by _____. This money to make bond,
    $_____ Was paid by _____ relationship _____

PART III

1. Acknowledging that I am still under oath, I certify that I have listed in Parts I and Part II all assets in which I hold or expect to hold any legal or equitable interest.
2. I am financially unable to obtain the assistance of a lawyer and require the court to appoint a lawyer for Me.
3. I understand that it is a Class A misdemeanor for which I can be sentenced to jail for up to 11months 29 days or be fined up to $2500.00 or both f I intentionally or knowingly misrepresent fully, or withhold any information required in the affidavit. I also understand that I may be required by the Court to provide other information in support of my request for an attorney.

This 20 day of November, 97 X Michael Rummel DEFENDANT

CLERK _____ JUDGE

IN THE CRIMINAL COURTS OF TENNESSEE FOR THE 30TH JUDICIAL DISTRICT AT MEMPHIS
DIVISION 6

ORDER

Be it remembered that on this date, the defendants listed below, having heretofore been indicted by the Grand Jury of Shelby County, Tennessee, as indicated by the number on each indictment and that the offense charged therein as shown opposite each Defendant's name , and being confined in jail or on bond, appeared in open Court on Arraignment and were advised by the Court that they had the right to have counsel of their own choice or by appoinment of the Court to represent them in all stages of the proceedings against them. That each Defendant, upon being duly sworn, stated in response to questions by the Court that he or she had recived a copy of the indictment against him or her and had read it.

Be it further rembered that the Court questioned each Defendant as to his or her financial ability to retain counsel of his or her choice at his or her own expense, and it appeared to the Court that each of the Defendants listed below was indigent and unable to bear the expense of counsel and each Defendant requesting the services of the Public Defender should be appointed as counsel for each defendant, and that their cases should be set for report/trial by the Court.

Indictment No.	Name	Offense	Report Date	Trial Date
97 10866	Calvin Buckley	CA: Agg Burg	12-1-97	
97 11764	Willie Perkins	Assault	12-9-97	
97 08817	Michael Zinner	Theft	1-6-98	

Whereupon the Court ordered that the Public Defender or his Deputy be hereby appointed to represent the above named Defendant(s) in the indictment(s) mentioned above, and whereupon the Public Defender did waive the formal reading of the indictment(s) as to each Defendant listed above and reserved for each Defendant the right to plead to the indictment.

Entered this 14 **day of** November, 19 97.

Approved:

Assistant Public Defender

W. Fred Axley
Judge

Filed: 11-14-97
William R. Key, Clerk

By: N. Ingram-Stark D.C.

STATE OF TENNESSEE) CRIMINAL COURT OF SHELBY COUNTY
)
SHELBY COUNTY) JANUARY TERM, 1998

Count 1

THE GRAND JURORS of the State of Tennessee, duly selected, empaneled, sworn and charged to inquire for the body of the county of Shelby, Tennessee, upon their oath, present that:

MICHAEL D. RIMMER

during the period of time between February 7, 1997 and February 8, 1997, in Shelby County, Tennessee, and before the finding of this indictment, did unlawfully, knowingly, and violently, by use of a deadly weapon, to wit: a firearm, obtain from the person of RICCI LYNN ELLSWORTH, a sum of money, all over the value of five hundred dollars but under the value of one thousand dollars of the proper goods and chattels of RICCI LYNN ELLSWORTH, in violation of T.C.A. 39-13-402, against the peace and dignity of the State of Tennessee.

District Attorney General
30th Judicial District

A.G. FILE # AA9002

NO. 98-01033

STATE OF TENNESSEE

Indictment for

T.C.A. 39-13-402

Aggravated Robbery (SCATS - 21025)

VS.

MICHAEL D. RIMMER

WITNESSES:
Summon for State

R. SHEMWELL, MPD, HOMICIDE BUREAU
W.L. ASHTON, MPD.
LINDA COOK, 6050 MACON CV.
DONALD ELLSWORTH, 3569 MAYFAIR
MARGIE FLOYD, 152 E.OAKHILL,DR.FLORENCE
T. HELLDORFER, D.R. STINE, C/O MPD.
RICHARD RIMMER, 5332 HWY 301 #B WALLS,MS.
SAMERA SAVARO, C/O TBI, NASHVILLE,TN.
BOBBI STACKS, C/O U.T. TOX. LAB

R. SHEMWELL
Prosecutor

A TRUE BILL

H. W. Rob
Foreman of the Grand Jury

Date Indictment Returned: 1-29-98

STATE OF TENNESSEE) CRIMINAL COURT OF SHELBY COUNTY
)
SHELBY COUNTY) JANUARY TERM, 1998

Count 1

THE GRAND JURORS of the State of Tennessee, duly selected, empaneled, sworn and charged to inquire for the body of the county of Shelby, Tennessee, upon their oath, present that:

MICHAEL D. RIMMER

during the period of time between February 7, 1997 and February 8, 1997, in Shelby County, Tennessee, and before the finding of this indictment, did unlawfully, intentionally, and with premeditation kill RICCI LYNN ELLSWORTH, in violation of T.C.A. 39-13-202, against the peace and dignity of the State of Tennessee.

William L. Gibbons
District Attorney General
30th Judicial District

STATE OF TENNESSEE) CRIMINAL COURT OF SHELBY COUNTY
)
SHELBY COUNTY) JANUARY TERM, 1998

Count 2

THE GRAND JURORS of the State of Tennessee, duly selected, empaneled, sworn and charged to inquire for the body of the county of Shelby, Tennessee, upon their oath, present that:

MICHAEL D. RIMMER

during the period of time between February 7, 1997 and February 8, 1997, in Shelby County, Tennessee, and before the finding of this indictment, did unlawfully, and with the intent to commit Robbery kill RICCI LYNN ELLSWORTH during the perpetration of Robbery, in violation of T.C.A. 39-13-202, against the peace and dignity of the State of Tennessee.

District Attorney General
30th Judicial District

A.G. FILE # AA9002

NO. 98-01034

STATE OF TENNESSEE

Indictment for

T.C.A. 39-13-202
T.C.A. 39-13-202

Murder First Degree (SCATS - 21015)
Murder in the Perpetration of a Felony (SCATS - 21015)

VS.

MICHAEL D. RIMMER

WITNESSES:
Summon for State

R. SHEMWELL, MPD, HOMICIDE BUREAU
W.L. ASHTON, MPD.
LINDA COOK, 6050 MACON COVE
MARGIE FLOYD, 152 E.OAKHILL DR.FLORENCE
DONALD ELLSWORTH, 3569 MAYFAIR
T. HELLDORFER, D.R. STINE, C/O MPD.
RICHARD RIMMER, 5332 HWY 301,#B WALLS,MS.
SAMERA SAVARO, C/O TBI, NASHVILLE
BOBBI STACKS, C/O U.T. TOX LAB

R. SHEMWELL
Prosecutor

A TRUE BILL

H.W. Rob
Foreman of the Grand Jury

Date Indictment Returned: 1-29-98

IN THE CRIMINAL COURTS OF TENNESSEE FOR THE 30TH JUDICIAL DISTRICT AT MEMPHIS
DIVISION 6

ORDER

Be it remembered that on this date, the defendants listed below, having heretofore been indicted by the Grand Jury of Shelby County, Tennessee, as indicated by the number on each indictment and that the offense charged therein as shown opposite each Defendant's name , and being confined in jail or on bond, appeared in open Court on Arraignment and were advised by the Court that they had the right to have counsel of their own choice or by appoinment of the Court to represent them in all stages of the proceedings against them. That each Defendant, upon being duly sworn, stated in response to questions by the Court that he or she had recived a copy of the indictment against him or her and had read it.

Be it further rembered that the Court questioned each Defendant as to his or her financial ability to retain counsel of his or her choice at his or her own expense, and it appeared to the Court that each of the Defendants listed below was indigent and unable to bear the expense of counsel and each Defendant requesting the services of the Public Defender should be appointed as counsel for each defendant, and that their cases should be set for report/trial by the Court.

Indictment No.	Name	Offense	Report Date	Trial Date
300394	Benjamin Owens	Burg of M.V.	2-27-98	
300395	"	"	"	
300396	"	"	"	
98 1033	Michael Rimmer	M 1st + MIP	3-18-98	
98 1031	"	Agg Robb	"	
37 04115	Billy Gene Saunders	M 1st	3-11-98	
981060	Jason Tysinger	Theft	2-20-98	
981061	"	"	"	

Whereupon the Court ordered that the Public Defender or his Deputy be hereby appointed to represent the above named Defendant(s) in the indictment(s) mentioned above, and whereupon the Public Defender did waive the formal reading of the indictment(s) as to each Defendant listed above and reserved for each Defendant the right to plead to the indictment.

Entered this 6 **day of** February, **19** 98.

Approved:

Assistant Public Defender

C. Fred Kelly
Judge

Filed: 2-6-98
William R. Key, Clerk

By: H. Ingram-Stark D.C.

IN THE CRIMINAL COURTS FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS
DIVISION VI

FILED
98 MAR -4 PM 12:21
WILLIAM K. KEY, CLERK
BY

STATE OF TENNESSEE

Plaintiff

VS.

MICHAEL RIMMER

Defendant

NO(S). 98-01034

MOTION FOR DISCOVERY

Comes now the accused, by and through counsel of record, the Shelby County Public Defender, and pursuant to Rule 16 of the Tennessee Rules of Criminal Procedure, moves this Honorable Court in the following particulars:

1. The accused moves this Court to order the State to allow the accused or accused's counsel, to inspect and/or copy any relevant written and/or recorded statements made by the defendant, which are within the possession, custody and/or control of the State, the existence of which is known, or by the exercise of due diligence, may become known, to the State. Tenn. R. Crim. P. 16(a)(1)(A), (1993).

2. The accused moves this Court to order the State to advise the accused, or accused's counsel, on the substance of any oral statements which the State intends to offer in evidence at the trial made by the accused whether before or after arrest in response to interrogations by any person then known to the accused to be a law enforcement officer. Tenn. R. Crim. P. 16(a)(1)(A), (1993).

3. The accused moves this Court to order the State to furnish the accused or accused's counsel, with all of the recorded testimony of the accused, if any, given before a grand jury which relates to the offense charged in the indictment returned in this case. Tenn. R. Crim. P. 16(a)(1)(A), (1993).

M1

4. The accused moves this Court to order the State of Tennessee to furnish the accused or accused's counsel, with a copy of the accused's prior record, if any, which is within the possession, custody, or control of the State of Tennessee, the existence of which is known, or by th due diligence may become known, to the State of Tennessee. Tenn. R. Crim. P. 16(a)(1)(B), (1993).

5. The accused moves this Court to order the State to permit the accused or accused's counsel, as requested, to inspect, copy and/or photograph books, papers, documents, photographs, tangible or demonstrative objects, buildings or places, or copies thereof, which are within possession, custody or control of the State, which are (a) material to the preparation of his defense, and/or (b) intended for use by the State as evidence in chief at the trial, and/or (c) obtained or belonged to accused. Tenn. R. Crim. P. 16(a)(1)(C), (1993).

6. The accused moves this Court to order the State to permit the accused or accused's counsel, to inspect, and copy or photograph any and all results or reports of (a) physical examinations, (b) mental examinations, (c) scientific tests or experiments, or copies thereof, which are within the possession, custody and/or control of the State, the existence of which is known, or by due diligence may become known, to the State and which are material to the preparation of the accused's defense and/or are intended for use as evidence in chief by the State and/or intended for use as evidence in chief by the State. Tenn. R. Crim. P. 16(a)(1)(D), (1993).

7. The accused moves the Court to order the State of Tennessee to furnish the accused or accused's counsel, with the name, address and telephone number of each person the State of Tennessee intends to call as a witness at the trial of this case upon the merits. Tenn. R. Crim. P. 16(a)(1) and 12.1.

8. The accused moves the Court to order the State to produce criminal records of the State's witnesses. State v. Irick, 762 S.W. 2d 121 (Tenn. 1988). In the interest of justice, the Court should also order the State to also make available any F.B.I.

reports and/or any exculpatory evidence from any of the State's witnesses. Graves v. State, 489 S.W. 2d 74 (Tenn. Crim. App. 1972).

9. The accused in a criminal proceeding is entitled to any information material either to the guilt or punishment of the accused and/or favorable to the accused, his defense, or sentence if found guilty. Brady v. Maryland, 373 U.S. 83, (1963). The prosecution has a duty to disclose exculpatory evidence which is not limited in scope to competent or admissable evidence; it extends to favorable information unknown to the accused. This duty also extends to disclose to the accused, or the accused's counsel, names and addresses of witnesses with information favorable to the accused. State v. Marshall, 845 S.W. 2d 228 (Tenn. Crim. App. 1992).

WHEREFORE, the accused respectfully moves this Honorable Court to grant the relief sought in the premises of this motion pursuant to Rules 12.1 and 16 of the Tennessee Rules of Criminal Procedure.

Respectfully submitted,

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing Motion has been delivered to the office of the District Attorney General this the 4 day of March 19 95.

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

2515B/1-3

IN THE CRIMINAL COURT OF TENNESSEE
THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS

Division Six

FILED
98 MAR 16 AM 9:02
WILLIAM K. KEY, CLERK
BY

STATE OF TENNESSEE

vs

INDICTMENT: 98-01033-34

Michael D. Rimmer

RESPONSE OF THE STATE OF TENNESSEE TO
MOTION OF DEFENDANT FOR PRE-TRIAL DISCOVERY:
MOTION OF THE STATE FOR RECIPROCAL PRE-TRIAL DISCOVERY:
AND OTHER MATTERS RELATING TO EXCHANGE OF PROOF

Comes now the State of Tennessee and, in response to the motion of defendant for pre-trial discovery, would respectfully state:

1. Statements, if any, made by the defendant and the substance of any oral statement, if any, intended to be offered in evidence at the trial made by the defendant in response to interrogations by any person then known to the defendant to be a law enforcement officer, may be inspected or copied at the office of the District Attorney General.

2. A copy of the prior criminal record, if any, of the defendant is available to counsel for defendant at the Office of the District Attorney General.

3. Counsel for defendant may, at the Office of the District Attorney General, inspect and copy or photograph books, papers, documents, photographs, and tangible objects which are or may come within the possession of the State which are intended for use as evidence in chief at trial.

4. Counsel for defendant may inspect and copy or photograph at the office of the District Attorney General any results or reports of physical examinations and of scientific tests or experiments which are or may come within the possession of the State and which are intended to be introduced at trial as evidence in chief.

5. The State of Tennessee declines to permit counsel for defendant to discover items excepted from pre-trial discovery under Rule 16(2) Tenn.R.Crim.P.

6. The names and addresses of witnesses to be called to testify on behalf of the State of Tennessee have been endorsed upon the indictment previously delivered to the defendant pursuant to T.C.A. Section 40-2407: and should any additional witnesses be discovered, the State of Tennessee will supply defendant with a list of their names and addresses.

7. The State of Tennessee has not been informed by counsel for defendant as to any theory or basis for defense and is, therefore, now unable to determine whether information in the possession of the prosecution is exonerative of the defendant or whether Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), applies to any such information. Consequently, until counsel for defendant provides a basis for examination of material in possession of the prosecution, the State relies on U.S. vs. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), and Moore v. Illinois, 408 U.S. 786, 92 S.Ct. 2562, 33 L.Ed.2d 706.

8. Having agreed that defendant is entitled to that pre-trial discovery described in paragraphs 1 through 4 herein, the State now respectfully moves the Honorable Court to require the defendant to state upon the record whether evidentiary items within the ambit of Tenn.R.Crim.P. 16 have previously been received, reviewed or copied by defendant or his attorney at any preliminary hearing or at any time from representatives of any law enforcement agency in order that duplicate, repetitive and redundant pre-trial discovery procedures should be avoided.

9. Having agreed that defendant is entitled to that discovery described in paragraphs 1 through 4 herein, and having requested that defendant be required to reveal whether any requested information has been received by defendant previously, the State of Tennessee now respectfully moves this Honorable Court to require defendant to file with the Court in writing a description of those items obtained, copied, or reviewed by defendant as a result of any pre-trial discovery procedures in order that there shall be a full and complete record of those items made known to the defendant.

10. The State of Tennessee now moves this Honorable Court to direct counsel for defendant to produce at trial any statements by witnesses testifying in behalf of the defendant in this cause, including any written statements or statements otherwise adopted or approved by witnesses, or any stenographic, mechanical, electrical or other recording of a statement or a transcription or

summary thereof, which is an essentially verbatim recital of an oral statement made by a testifying witness, as required by T.C.A. Section 40-2446.

11. The State of Tennessee now respectfully moves this Honorable Court to direct that defendant and counsel for defendant permit pre-trial discovery by the State, as follows:

1) Inspection and copying of books, papers, documents, photographs, tangible objects within possession, custody or control of the defendant which defendant intends to introduce as evidence in chief at trial.

2) Inspection and copying of any results or reports of physical or mental examinations and of scientific tests or experiments within the possession, custody or control of the defendant which defendant intends to introduce as evidence in chief at trial.

3) The names and current addresses of all persons intended to be called as witnesses on behalf of defendant.

Respectfully submitted,

Thomas D. Henderson
Assistant District Attorney General

CERTIFICATE OF SERVICE

This is to certify that a true and exact copy of the foregoing response was caused to be delivered to Public Defender, counsel for the defendant, on February 11, 1998

Thomas D. Henderson
Assistant District Attorney General

IN THE CRIMINAL COURTS FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS
DIVISION VI

FILED
98 MAR -4 PM 12:27
WILLIAM R. KEY, CLERK
BY

STATE OF TENNESSEE

Plaintiff

VS.

MICHAEL RIMMER

Defendant

NO(S). 98-01034

MOTION TO SET AND DISPOSE OF MOTIONS PRIOR TO TRIAL

The accused, by counsel and pursuant to Rule 12(e) of the Tennessee Rules of Criminal Procedure, requests that this Court make all rulings on pretrial motions prior to the trial in this matter. In support of this motion, the accused would state:

1. The accused has filed extensively pre-trial motions including motions to suppress evidence. Tenn. R. Crim. P. 12(b)(3), (1993).

2. Proper and thorough presentation and consideration of these motions is essential to the defense of this case which contains complex factual and legal issues.

3. The accused believes that his motions will receive fuller consideration if the Court sets a motion date pursuant to Rule 12(c) and hears the motions without the pressure of a waiting jury on the date set for trial.

4. The resolution of this case would carry the most severe conseguences for the accused; therefore, he should be allowed the most advantageous circumstances for the development of his defenses.

WHEREFORE, DEFENDANT PRAYS that this Court, pursuant to Rule 12 of the Tennessee Rules of Criminal Procedure, specially set a date prior to trial for the purpose of receiving evidence and legal argument on his motions.

Respectfully submitted,

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

M2

CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing Motion has been delivered to the office of the District Attorney General this the 9 day of March 19 98.

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

2515B/4-5

IN THE CRIMINAL COURTS FOR THE THIRTIETH JUDICIAL
DISTRICT AT MEMPHIS
DIVISION VI

FILED
98 MAR -4 PM 12:27
WILLIAM K. KEY, CLERK
BY

STATE OF TENNESSEE

Plaintiff

VS.

MICHAEL RIMMER

Defendant

NO(S). 98-01034

MOTION TO REQUIRE THE STATE TO ANNOUNCE WHETHER IT INTENDS TO SEEK THE DEATH PENALTY OR OTHER ENHANCED PUNISHMENT

Comes now the Defendant, by and through counsel of record, and moves this Honorable Court to require the State to announce whether it will seek the death penalty in the trial of the above cause, relying upon the following particulars:

1. The Defendant has been indicted for the offense of murder in the first degree, a capital offense. A capital case is defined as:

> A case in which an individual is indicted for an offense that is punishable by death and wherein the District Attorney General announces to the Court at any time, prior to the presentation of proof, that the State will insist upon the death penalty.

Tenn. Code Ann. Section 40-14-207, quoted in Tenn. R. Sup. Ct. 13 Section 1 (1992).

2. This Honorable Court has appointed the Shelby County Public Defender to represent the Defendant.

3. The Defendant alleges that if the State of Tennessee intends to seek the death penalty in this cause, the Defendant is lawfully entitled to and should receive the assistance of two (2) attorneys. Tenn. R. Sup. Ct 13 Section 1 (1992). See also Tenn. Code Ann. Sections 40-14-207 and 209 (1990).

4. If the State of Tennessee does not intend to seek the death penalty, the District Attorney General, as counsel for the State, should in good faith announce such intentions to this Court and the Defendant. Rule 12.3(b) of Tenn. R. Crim. P. reguires notice of the

M3

District Attorney's intent to ask for the death penalty. The notice required in Capital Cases must:

a. be in writing;

b. be filed not less than thirty days prior to trial; and

c. specify those aggravating circumstances that the State intends to rely upon at a sentencing hearing.

Tenn. R. Crim. P. 12.3(b) (1993).

5. The Defendant requests written notice if the State of Tennessee intends to seek a sentence of imprisonment for life without parole. Tenn. Code Ann. 39-13-208 (1993).

6. The Defendant alleges that the resources of the Shelby County Public Defender's Office will not permit the assistance of two (2) attorneys in any but the most complex noncapital cases without compensation from the State of Tennessee.

WHEREFORE, the Defendant respectfully moves this Honorable Court to require the State of Tennessee to declare whether it will examine prospective jurors with respect to capital punishment, or whether the State of Tennessee will ask for the imposition of a sentence of life without possibility of parole. Additionally, if the District Attorney fails to comply with the thirty day filing requirement, Defendant respectfully requests that this Honorable Court grant the Defendant a reasonable continuance of the trial. Tenn. R. Crim. P. 12.3(b) (1993).

Respectfully submitted,

RONALD JOHNSON
ASSISTANT PUBLIC DEFENDER
201 Poplar Avenue, Suite 2-01
Memphis, TN 38104
(901) 576-5800

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been delivered to the office of the District Attorney General this the 4 day of March, 19 94.

RONALD JOHNSON
ASSISTANT PUBLIC DEFENDER

2515B/6-7

IN THE CRIMINAL COURT OF TENNESSEE
THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS

Division Six

FILED
98 MAR 16 AM 9:01
WILLIAM K. KEY, CLERK
BY

STATE OF TENNESSEE

vs

INDICTMENT: 98-01033-34

Michael D. Rimmer

RESPONSE OF THE STATE OF TENNESSEE TO
MOTION OF DEFENDANT TO REQUIRE THE STATE TO
ANNOUNCE ITS INTENTION TO SEEK THE DEATH PENALTY

In response to the motion to require the State to announce its intention to seek the death penalty, the State submits as follows:

1. The Grand Jury of Shelby County, Tennessee, having returned a true bill of indictment charging the defendant with the offense of Murder in the First Degree, the State, at a trial of said indictment, would voir dire and attempt to impanel a jury that could and would follow the law as given them by the Court and consider the full range of punishment applicable to the charge of Murder in the First Degree.

2. In accordance with Tennessee Rule of Criminal Procedure 12.3, the State intends to rely upon at the sentencing hearing the below indicated aggravating circumstances:

(1) The murder was committed against a person less than twelve (12) years of age and the defendant was eighteen (18) years of age or older.

Yes ( )
No (X)

(2) The defendant was previously convicted of one or more felonies, other than the present charge,which involved the use or the threat of violence to the person.)

Yes (X)
No ( )

(3) The defendant knowingly created a great risk of death to two or more person, other than the victim murdered, during his act of murder.

Yes ( )
No (X)

(4) The defendant committed the murder for remuneration or the promise of remuneraation, or employed another to commit the murder for remuneration or the promise of remuneration.

Yes ( )
No (X)

(5) The murder was especially heinous, atrocious or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death.

Yes ( )
No (X)

(6) The murder was committed for the purpose of avoiding, interfering with or preventing a lawful arrest or prosecution of the defendant or another.

Yes ( )
No (X)

(7) The murder was committed while defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb.

Yes X
No ( )

(8) The murder was committed by the defendant while he was in lawful custody or in a place of lawful confinement, or during his escape from lawful custody or from a place of lawful confinement.

Yes ( )
No X

(9) The murder was committed against any peace officer,corrections official, corrections employee, or fireman, who was engaged in the performance of his duties, and the defendant knew or reasonably should have known that such victim was a peace officer, or corrections official, corrections employee, or fireman, engaged in the performance of his duties.

Yes ( )
No X

(10) The murder was committed against any present or former judge, District Attorney General, Assistant District Attorney General or Assistant State Attorney General, due to or because of the exercise of his official duty or status, and the defendant knew that the victim occupied said office.

Yes ( )
No X

(11) The murder was committed against a national, state or local popularly elected official, due to or because of the official's lawful duties or status, and the defendant knew that the victim was such an official.

Yes ( )
No X

(12) The defendant committed "mass murder", which is defined as the murder of three or more persons within the State of Tennessee, within a period of 48 months, and perpetrated in a similar fashion in a common scheme or plan.

Yes ( )
No X

Respectfully submitted,

Thomas D. Henderson
Assistant District Attorney General

CERTIFICATE OF SERVICE

This is to certify that a true and exact copy of the foregoing response was caused to be delivered to Public Defender, counsel for the defendant, on February 11, 1998

Thomas D. Henderson
Assistant District Attorney General

IN THE CRIMINAL COURT OF TENNESSEE
THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS

Division Six

STATE OF TENNESSEE

vs

INDICTMENT: 98-01033-34

Michael D. Rimmer

RESPONSE OF THE STATE OF TENNESSEE TO
MOTION TO REQUIRE THE STATE TO ANNOUNCE ITS INTENTION
TO SEEK THE DEATH PENALTY

In response to defendant's motion the State of Tennessee would submit as follows:

The Grand Jury of Shelby County, Tennessee, having returned a True Bill of Indictment charging the defendant, Michael D. Rimmer, with the offense of Murder in the First Degree, the State, at a trial of said indictment, would voir dire and attempt to empanel a jury that could and would follow the law as given them by the Court and consider the full range of punishment applicable to the charge of Murder in the First Degree.

Respectfully submitted,

Thomas D. Henderson
Assistant District Attorney General

CERTIFICATE OF SERVICE

This is to certify that a true and exact copy of the foregoing response was caused to be delivered to Public Defender, counsel for the defendant, on February 11, 1998

Thomas D. Henderson
Assistant District Attorney General

IN THE CRIMINAL COURTS FOR THE THIRTIETH JUDICIAL
DISTRICT AT MEMPHIS
DIVISION VI

FILED
98 MAR -4 PM 12:27
WILLIAM A. KEY, CLERK
BY

STATE OF TENNESSEE

Plaintiff

VS.

MICHAEL RIMMER

Defendant

NO(S). 98-01034

MOTION FOR NOTICE OF THE STATE'S INTENTION TO USE EVIDENCE

The accused, by counsel and pursuant to Rule 12(d)(2) of the Tennessee Rules of Criminal Procedure, requests that this Court order State of Tennessee to give notice to the accused of its intention to use evidence which may be:

a. discoverable by the accused pursuant to Rule 16;

b. the subject matter of a motion to suppress in order to afford the accused an opportunity to raise objections to such evidence prior to trial in conformity with the provisions of Rule 12(b)(3);

c. favorable to the defense of the accused. Brady v. Maryland, 373 U.S. 83, (1963). Compliance with Rule 12(d)(2), 12(b)(3) and 16 are not at the discretion of the State. The accused in this motion is not attempting to use Rule 12 as a substitute for discovery.

WHEREFORE, the accused pursuant to Rule 12 of the Tennessee Rules of Criminal Procedure, respectfully moves this Honorable Court to grant the relief sought in the premises of this motion.

Respectfully submitted,

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

M4

CERTFICATE OF SERVICE

I certify that a copy of the foregoing has been delivered to the Office of the District Attorney General this the 1st day of March, 1985.

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

2515B/8-9

IN THE CRIMINAL COURTS FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS
DIVISION VI

FILED
98 MAR -4 PM 12:27
WILLIAM K. REY, CLERK
BY_____

STATE OF TENNESSEE

Plaintiff

VS.

MICHAEL RIMMER

Defendant

NO(S). 98-01034

MEMORANDUM OF ACCUSED IN SUPPORT OF HIS RULE 12(d)(2) MOTIONS

This Rule was copied from the same numbered Rule in the Federal Rules of Criminal Procedure adopted in 1974 as an amendment to the then existing Rule 12. The purpose of the Rule is stated in the Notes of the Advisory Committee as follows:

> In cases in which Defendant wishes to know what types of evidence the government intends to use so that he can make his Motion to Suppress prior to trial, he can request the government to give notice of its intention to use specified evidence which the Defendant is entitled to discover under Rule 16. Although the Defendant is already entitled to discovery of such evidence prior to trial under Rule 16, Rule 12 makes it possible for him to avoid the necessity of moving to suppress evidence which the government does not intend to use.
>
> Pretrial notice by the prosecution of its intention to use evidence which may be subject to a Motion to Suppress is increasingly being encouraged in State practice (citations omitted).
>
> In the interest of better administration of criminal justice, we suggest that wherever practicable the prosecutor should within a reasonable time before trial notify the defense as to whether any alleged confession or admission will be offered in evidence at the trial. We also suggest, in cases where such notice is given by the prosecution, that the defense, if it intends to attack the confession or admission as involuntary, notify the prosecutor of the desired mode of the defense for a special determination on such issue.
>
> At the time of arraignment when a Defendant pleads not guilty, or as soon as possible thereafter, the State will advise the Court as to whether its case against the Defendant will include evidence obtained as the result of search and seizure; evidence discovered because of a confession or statements obtained from the Defendant; or statements in the nature of confessions.

M5

The Rule seems clear and unambiguous and the comments clearly show that the purpose is to promote disclosure and allow for the pretrial resolution of issues not directly bearing on the issue of guilt or innocence.

Respectfully submitted,

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been delivered to the office of the District Attorney General this the 4 day of March, 19 98.

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

2515B/10-11

IN THE CRIMINAL COURT OF TENNESSEE
THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS

Division Six

FILED
98 MAR 16 AM 9:02
WILLIAM [illegible], CLERK
BY

STATE OF TENNESSEE

vs

INDICTMENT: 98-01033-34

Michael D. Rimmer

RESPONSE OF THE STATE OF TENNESSEE TO
MOTION FOR NOTICE OF INTENTION TO USE EVIDENCE

In response to the Motion for Notice of Intention to Use Evidence heretofore filed, the State of Tennessee respectfully submits the following:

1. Rule 12, Tenn.R.Crim.P., gives the State an opportunity, not a duty, to give such notice.

2. Rule 12, Tenn.R.Crim.P., is not intended as a substitute for discovery.

3. At present, the State intends to offer at trial all relevant discoverable evidence.

Respectfully submitted,

Thomas D. Henderson
Assistant District Attorney General

CERTIFICATE OF SERVICE

This is to certify that a true and exact copy of the foregoing response was caused to be delivered to Public Defender, counsel for the defendant, on February 11, 1998

Thomas D. Henderson
Assistant District Attorney General

IN THE CRIMINAL COURTS FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS
DIVISION VI

FILED
98 MAR -4 PM 12:27
WILLIAM R. KEY, CLERK
BY _____

STATE OF TENNESSEE *
*
Plaintiff *
*
*
VS. * NO(S). 98-01034
*
MICHAEL RIMMER *
*
*
Defendant *

MOTION FOR WITNESS STATEMENTS

Comes now the accused pursuant to Rules 16 & 26 of the Tennessee Rules of Criminal Procedure, and moves this Honorable Court in following particulars:

1. The accused moves this Court, in its discretion, to require the State of Tennessee to furnish the accused, by counsel, prior to trial with a summary of the testimonies of witnesses who will testify for the prosecution during the trial of this cause on the merits. United States v. Turner, 423 F. Supp. 957 (1976). The accused states such access will advance the administration of criminal justice, permit counsel to be more effective in representing the accused, and prevent the accused from being prejudiced by the requesting and passing as well as the reviewing of such material in the presence of the jury.

2. If this Court refuses to order the State of Tennessee to furnish such summaries in advance of trial, the accused moves this Court to permit: (a) the accused to request such statements outside the presence of the jury; (b) the State of Tennessee to furnish such statements outside the presence of the jury; and (c) defendant's counsel to review such statements outside the presence of the jury. Tenn. R. Crim. P. 26.2(d) (1993).

3. The accused hereby makes demand for all statements discoverable pursuant to Rule 26.2 of the Tennessee Rules of

M6

Criminal Procedure and State v. Robinson, 618 S.W. 2d 754 (Tenn. Crim. App. (1981) and this request shall be a continuing request pursuant to the Rule.

4. The accused requests that any questions about whether a statement qualifies under the terms of the Rule, be resolved by this in a hearing outside the presence of the jury. Determination of what constitutes qualifying statements by a witness is a matter solely within the discretion of the judge. State v. Daniel, 663 S.W. 2d 809 (Tenn. Crim. App. 1983). Additionally, the accused moves this Court to permit the accused to question the witness outside the presence of the jury concerning if the witness has in fact made a qualifying statement.

WHEREFORE, the accused, pursuant to Rule 26.2 of the Tennessee Rules of Criminal Procedure, respectfully moves this Honorable Court to grant the relief sought in the premises of this motion.

Respectfully submitted,

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been delivered to the Office of the District Attorney General this the 4 day of March, 1998.

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

2515B/12-13

IN THE CRIMINAL COURTS FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS
DIVISION VI

FILED
98 MAR -4 PM 12:27
WILLIAM R. KEY, CLERK
BY_____

STATE OF TENNESSEE *
*
Plaintiff *
*
*
VS. * NO(S). 98-01034
*
MICHAEL RIMMER *
*
Defendant *

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR WITNESS STATEMENTS

Comes now the accused through his attorneys of record and in support of his "Motion for Witness Statements" would show the Court the following:

Although Tennessee Courts appear to be silent on the issue, there is a growing line of cases exposing the defendant's right to request, receive and examine Jencks Act statements out of the presence of the jury. This right is best articulated in the case of Gregory v. United States, 125 U. S. App. D.C. 140, 369 F. 2d 185 (1966), cert. denied 393 U. S. 865:

> "Our purpose ... in requiring that opportunity be provided to defense counsel to request and receive Jencks Acts statements outside the presence of the jury is to preclude the jury from drawing an inference that the statement or statements received are consistent with witness' testimony unless defense counsel uses the statements to cross-examine him. It is familiar law that prior consistent statements are not admissible in evidence, and consequently it is improper to require a procedure, in exercising Jencks Act rights, which may permit the inference that the prior statements received are consistent with the witness' testimony on trial. We perceived no reason, other than to prejudice the defendant in the exercise of his Jencks Act rights, to require defense counsel to request and receive Jencks Act statements in the presence of the jury." at pg. 191 (emphasis added). See also Johnson v. United States, 121 U. S. App. D.C. 19, 347 F. 2d 803 (1965); United States v. Gardin, 382 F. 2d 601 (2d Cir. 1967); United States v. Nielsen, 392 F. 2d 849 (1968).

Clearly the ends of justice would be better served if the

M7

procedure requested in defendant's motion were followed. As was stated in United States v. Gardin, supra, at pg. 605:

> "... we are of the opinion that the fair and just administration of criminal prosecutions might well be better served if the proceeding for the production of Jencks Acts Statements or reports were to take place out of the presence of the jury when the defendant requests that this be done."

Respectfully submitted,

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been delivered to the office of the District Attorney General this the 4 day of March, 19 98.

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

2515B/14-15

IN THE CRIMINAL COURT OF TENNESSEE
THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS

Division Six

STATE OF TENNESSEE

vs

INDICTMENT: 98-01033-34

Michael D. Rimmer

RESPONSE OF THE STATE OF TENNESSEE TO
MOTION OF DEFENDANT FOR PRE-TRIAL DISCOVERY
OF STATEMENTS OF STATE WITNESSES

In response to the motion of the defendant for pre-trial discovery of statements of State witnesses, the State would show:

1. The defendant is not entitled to pre-trial discovery of statements made by State witnesses.

2. Pursuant to Rule 26.2. Tenn.R.Crim.P., the State will make available to the defendant those witness statements it may have at the proper time and place and in compliance with said Rule.

Respectfully submitted,

Thomas D. Henderson
Assistant District Attorney General

CERTIFICATE OF SERVICE

This is to certify that a true and exact copy of the foregoing response was caused to be delivered to Public Defender, counsel for the defendant, on February 11, 1998

Thomas D. Henderson
Assistant District Attorney General

IN THE CRIMINAL COURTS FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS
DIVISION VI

FILED
98 MAR -4 PM 12:27
WILLIAM R. KEY, CLERK
BY_____

STATE OF TENNESSEE

Plaintiff

VS.

MICHAEL RIMMER

Defendant

NO(S). 98-01034

MOTION FOR DISCLOSURE OF IMPEACHING INFORMATION

Comes now the accused, by and through her attorney of record, respectfully moves this Honorable Court for entry of an order directing the State to disclose to the accused, or her counsel the following information, which is within the possession, custody, control of the State of Tennessee, or the existence of which is known to the State:

1. Any and all considerations or promises of consideration given to or made on behalf of government witnesses. By "consideration" the accused means anything of value or use, including, but not limited to, immunity grants, witness fees, assistance or favorable treatment with respect to any criminal matters. Also, the accused requests anything which could arguably or reasonably create an interest or bias in the witness in favor of the State or against the defendant, or act as an indictment to testify or to color testimony. State v. Benson, 645 S.W. 2d 423 (Tenn. Crim. App. 1983); Giglio v. United States, 405 U.S. 150 (1972); Napue v. Illinois, 360 U.S. 264 (1959). In Benson the court held that "when the credibility of a witness is material or the State has falsely denied that a deal was made, the prosecution is required to disclose that a witness has been offered concessions". Benson at 426.

2. Any and all prosecution, investigations, or possible

M8

prosecutions pending or which could be brought against the witness as well as any probationary, parole or deferred prosecution status of the witness which could be used by the State as a basis for consideration or promise of consideration to the witness. State v. Irick, 762 S.W. 2d 121 (Tenn. 1988).

3. Any and all information which could prove favorable to the accused in his defense. Brady v. Maryland, 373 U.S. 83; State v. Marshall, 845 S.W. 2d 228 (Tenn. Crim. App. 1992); State v. Newsome, 744 S.W. 2d 911 (Tenn. Crim. App. 1982); State v. Baker, 623 S.W. 2d 132 (Tenn. Crim. App. 1981).

WHEREFORE, the accused respectfully moves this Honorable Court to grant the relief sought in this motion.

Respectfully submitted,

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been delivered to the Office of the District Attorney General this the 1 day of March, 19 98.

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

2515B/16-17

IN THE CRIMINAL COURT OF TENNESSEE
THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS

Division Six

STATE OF TENNESSEE

vs

INDICTMENT: 98-01033-34

Michael D. Rimmer

RESPONSE OF THE STATE OF TENNESSEE
TO MOTION FOR DISCLOSURE OF IMPEACHING INFORMATION

For response to the Motion for Disclosure of Impeaching Information, the State would submit as follows:

1. The State agrees to advise defense counsel promptly of any consideration or promises of consideration given to or made on behalf of government witnesses; however, the request for information in the motion is much too broad and vague and should not be granted as requested. The information requested includes that which could "arguably create an interest or bias in the witness in favor of the state or against the defendant." Such ordinary considerations as placing witnesses on call or furnishing transportation for those who are without it may "arguably" create an interest or bias in favor of the State; however, the State does not believe that the law requires disclosure of such consideration.

2. The State respectfully denies that the defense is entitled under the law to notice of any and all prosecutions, investigations, or pending prosecutions against any witness called by the State of Tennessee.

3. The State respectfully denies that the defense is entitled under the law to any prior criminal convictions of any witnesses not obtainable from the Clerk of the Criminal Court of Shelby County, and would submit that there is no law to support such request.

Respectfully submitted,

Thomas D. Henderson
Assistant District Attorney General

CERTIFICATE OF SERVICE

This is to certify that a true and exact copy of the foregoing response was caused to be delivered to Public Defender, counsel for the defendant, on February 11, 1998

Thomas D. Henderson
Assistant District Attorney General

IN THE CRIMINAL COURTS FOR THE THIRTIETH JUDICIAL
DISTRICT AT MEMPHIS
DIVISION VI

FILED
98 MAR -4 PM 12:27
WILLIAM R. KEY, CLERK
BY _____

STATE OF TENNESSEE *

Plaintiff *

VS. * NO(S). 98-01034

MICHAEL RIMMER *

Defendant *

MOTION FOR PRODUCTION OF EXCULPATORY EVIDENCE

The accused through his attorney respectfully request this Honorable Court in the following:

1. The accused moves this Court pursuant to Rule 16(a)(1)(A) of the Tennessee Rules of Criminal Procedure to order the State of Tennessee and/or any law enforcement agencies conducting the supportive investigation for the prosecution to advise the accused, or his counsel, of the substance of any oral self-serving or exculpatory statements made by the accused. If the self-serving or exculpatory statements made by the accused are (a) in written form, (b) have been reduced to writing, or (c) have been electronically recorded and preserved, the accused moves this Court to order the State of Tennessee and/or any law enforcement agency in possession thereof to produce same for inspection by the accused, or his counsel, and furnish the accused, or his counsel, with a copy thereof. Brady v. Maryland, 373 U.S. 83 (1963); State v. Marshall, 845 S.W. 2d 228 (Tenn. Crim. App. 1992).

2. The accused moves this Court to order the State of Tennessee to reveal to the accused the existence of any material variances in the statements of witnesses, accomplices, co-conspirators, accessories before and after the fact, and/or principals, including statements given the investigatory agency, the prosecution, testimony in another trial, or testimony before the

grand jury. United States v. Polisi, 416 F. 2d 573 (2nd Cir. 1969); Lindsey v. King, 769 F. 2d 1034.

3. The accused moves this Court to order the State of Tennessee to reveal to the accused the names, addresses, and telephone numbers of any witnesses known to any investigatory agencies and/or the prosecution who have misidentified any physical evidence or facts pertaining to the charges pending against the accused, or who have in fact misidentified the accused, any accomplice, co-conspirator, accessory before or after the fact, or co-principal. Jackson v. Wainwright, 390 F. 2d 288 (5th Cir. 1968); Simos v. Gray, 356 F. Supp. 265 (E. D. Wis. 1973); People v. Simmons, 325 N.E. 2d 139 (1975); Lindsey v. King, 769 F. 2d 1034.

4. The accused moves this Court to order the State of Tennessee to reveal to the accused the names, addresses, and telephone numbers of any witnesses who have furnished the investigatory agencies and/or the prosecution with physical descriptions which do not correspond to the physical description of the accused; or who have been unable to identify the accused from photographs, line-ups, or other attempts at identifying the accused as being the perpetrator of the pending criminal charges. Jackson v. Wainwright, 390 F. 2d 288 (5th Cir. 1968); Simos v. Gray, 356 F. Supp. 265 (E. D. Wis. 1973); People v. Simmons, 325 N.E. 2d 139 (1975); Lindsey v. King, 769 F. 2d 1034.

5. The accused moves this Court to order the State of Tennessee to reveal to the accused the names, addresses, and telephone numbers of any witnesses who have not given statements in written form, but who have orally indicated to the investigatory agencies and/or the prosecution that what they know supports the innocence of the accused and/or is exculpatory in nature.

6. The accused moves this Court to order the State of Tennessee to give to the accused, or his counsel, copies of and the right to inspect any written statements given to the prosecution and/or any investigatory agencies, which in whole or in part support the innocence of the accused and/or are exculpatory in nature when viewed in light of the guilt or innocence of the accused.

7. The accused moves this Court to order the State of Tennessee to furnish the accused, of his counsel, with any medical and/or scientific evidence or results which are consistent with the innocence of the accused and/or is exculpatory in nature. Barbee v. Warden, Maryland Penitentiary, 331 F. 2d 842 (4th Cir. 1964); Hamric v. Bailey, 386 F. 2d 390 (4th Cir. 1967).

8. If the prosecution is unable to determine whether a particular object or matter within its possession or control is exculpatory in nature, the accused moves this Court to order the State of Tennessee to submit such matter to this Court for the purpose of an in camera inspection so this Court can determine if the data so submitted is exculpatory in nature. State v. Gaddis, 530 S.W. 2d 64 (Tenn. 1975).

9. The accused alleges he is in need of the material requested in this motion in advance of trial and at the earliest opportunity. The information furnished the accused may very well lead the accused to additional sources of information. Thus, furnishing the accused with such information in advance of trial will permit the accused, with the effective assistance of counsel, to investigate, accumulate, evaluate and prepare the evidence for trial without unnecessary delays.

10. The accused moves this Court to make its order in this cause a continuing order and to require the prosecution to furnish the accused with such facts and information contemplated by the order which are received by the prosecution subsequent to the entering of the order. Tenn. R. Crim. R. 16(c) (1993).

WHEREFORE, the accused respectfully moves this Honorable Court to grant the relief requested in the premises of this motion.

Respectfully submitted,

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing Motion has been delivered to the office of the District Attorney General this the 7 day of March, 1985.

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

2515B/18-21

IN THE CRIMINAL COURTS FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS
DIVISION VI

FILED
98 MAR -4 PM 12:28
WILLIAM R. KEY, CLERK
BY _____

STATE OF TENNESSEE

Plaintiff

VS.

MICHAEL RIMMER

Defendant

NO(S). 98-01034

MEMORANDUM OF AUTHORITIES IN SUPPORT OF MOTION FOR EXCULPATORY EVIDENCE

I.

In this jurisdiction, once the accused makes a motion for discovery of items in possession of the State, there is a burden on the State to act with reasonable diligence. State v. Benson, 645 S.W. 2d 423 (Tenn. Crim. App. 1983). Full and reciprocal discovery in criminal cases consistent with the rights of the accused is looked upon with favor. State v. Brown, 552 S.W. 2d 383 (Tenn. 1977); State v. Gaddis, 530 S.W. 2d 64 (Tenn. 1975); State v. Stephens, 529 S.W. 2d 712 (Tenn. 1975); See ABA Standards for Criminal Justice, Vol. II, Discovery and Procedure Before Trial (2nd Ed. 1986), C. P. Jhony, Discovery-Prosecution's Evidence, 7 A. L. R. 3d 8 (1966).

II.

The prosecutorial duty to disclose favorable or exculpatory evidence is not limited in scope to "competent evidence or admissable evidence; it extends to "favorable information" unknown to the accused as well as witness impeachment evidence. United States v. Bagley, 105 S. Ct. 3375 (1985); Unites States v. Gleason, 265 F. Supp. 880 (S.D.N.Y. 1967); Branch v. State, 469 S.W. 2d 533 (Tenn. Crim. App. 1969); State v. Marshall, 845 S.W. 2d 228 (Tenn. Crim. App. 1992). The prosecutorial duty also includes material not

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presently in his/her possession but obtainable through an exercise of due diligence. State v. Hicks, 618 S.W. 2d 510 (Tenn. Crim. App. 1981). The accused must make a proper request in situations where the evidence is not obviously exculpatory. State v. Marshall, 845 S.W. 2d 228 (Tenn. Crim. App. 1992).

III.

Pursuant to the doctrine of Brady v. Maryland, 373 U.S. 83 (1963), the accused in a criminal proceeding is entitled to the following:

a. Names of any potential witnesses the prosecution intends to summon during the course of the trial. State v. Street, 768 S.W. 2d 703 (Tenn. Crim. App. 1988).

b. Any standing offer to plea bargain, any pending plea bargaining negotiations as well as concluded plea bargains which the prosecution has induced, encouraged or is inducing or encouraging any witness, accomplice, co-conspirator, accessory before the fact and/or principal to testify against the accused during the course of trial in exchange for a favorable recommendation. Napue v. Illinois, 360 U. S. 264 (1959); Giglio v. United States, 405 U. S. 150 (1972); DeMarco v. United States, 415 U. S. 449 (1974); People v. Reed, 224 N.W. 2d 867 (1975).

c. Any promise or offer to recommend a reduction in the charge or sentence of any witness, accomplice, co-conspirator, accessory before the fact and/or principal in exchange for testimony against the accused before the Grand Jury and/or during the course of trial. United States v. Bagley, 105 S. Ct. 3375 (1985); Napue v. Illinois, 360 U.S. 264 (1959); Giglio v. United States, 405 U.S. 150 (1972); DeMarco v. United States, 415 U.S. 449 (1974); Ray v. Rose, 535 F. 2d 966 (6th Cir. 1976); People v. Reed, 224 N.W. 2d 867 (1975).

d. Any offer of concessions to a witness when the credibility of a witness is material or the State has falsely denied that a deal was made. State v. Benson, 645 S.W. 2d 423 (Tenn. Crim. App. 1983).

e. Any material variances in the statements of witnesses, accomplices, co-conspirators, accessories before the fact and/or

principals, including statements given the investigatory agency, the prosecution, testimony in another trial, testimony at the preliminary hearing, or testimony before the Grand Jury. Lindsey v. King, 769 F. 2d 1034 (5th Cir. 1985); Unites States v. Poliski, 416 F. 2d 573 (2nd Cir. 1969); State v. Marshall, 845 S.W. 2d 228 (Tenn. Crim. App. 1992).

f. The names and addresses of witnesses who could exonerate the accused, who could corroborate the accused's assertion of innocence, or who possessed favorable information that would have enabled the accused's counsel to conduct further and possibly fruitful investigation as to whether someone other than the accused killed the victim, as well as statements that were exculpatory or favorable to the accused. State v. Marshall, 845 S.W. 2d 228 (Tenn. Crim. App. 1992).

g. The names, addresses and telephone numbers of any witnesses known to the law enforcement officials conducting the investigation in this matter or the prosecution who have misidentified any physical evidence or facts pertaining to the criminal charge against the accused or his/her co-defendant. Lindsey v. King, 769 F. 2d 1034 (5th Cir. 1985); Simos v. Gray, 356 F. Supp. 265 (E. D. Wis. 1973); People v. Simmons, 325 N. E. 2d 139 (1975).

h. The names, addresses and telephone numbers of any witnesses who have furnished law enforcement officials with physical descriptions which do not correspond to the physical description, characteristics and/or colorations of the accused. Lindsey v. King, 769 F. 2d 1034 (5th Cir. 1985); Jackson v. Wainwright, 390 F. 2d 288 (5th Cir. 1968); Simos v. Gray, 356 F. Supp. 265 (E. D. Wis. 1973); People v. Simmons, 325 N. E. 2d 139 (1975).

i. The names, addresses and telephone numbers of witnesses who have indicated to the prosecution and/or law enforcement officials investigating this matter that what they know supports the innocence of the accused and/or is exculpatory in nature or might mitigate the punishment rendered by the jury. United States v. Dye, 221 F. 2d 763 (3rd Cir. 1955); United States Ex. Rel. Meers v.

Wilkins, 326 F. 2d 135 (2nd Cir. 1964); Banks v. State, 218 S. E. 2d 851 (1975).

j. Any medical and/or scientific evidence consistent with the innocence of the accused and/or exculpatory in nature or which might be used to mitigate any punishment which might be assessed in this cause against the accused. Barbee v. Warden, Maryland Penitentiary, 331 F. 2d 842 (4th Cir. 1964); Hamric v. Bailey, 386 F. 2d 390 (4th Cir. 1967).

Respectfully submitted,

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing Memorandum has been delivered to the office of the District Attorney General this the 4 day of March, 19 96.

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

2515B/22-25

IN THE CRIMINAL COURT OF TENNESSEE
THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS

Division Six

FILED
98 MAR 16 AM 9:02
WILLIAM [illegible] CLERK
BY

STATE OF TENNESSEE

vs

INDICTMENT: 98-01033-34

Michael D. Rimmer

RESPONSE OF THE STATE OF TENNESSEE TO
MOTION OF DEFENDANT FOR PRE-TRIAL DISCOVERY
OF EXCULPATORY EVIDENCE

In response to the motion of defendant for pre-trial discovery of exculpatory evidence, the State would show:

1. The State of Tennessee is now unaware of any evidence which tends to exculpate the defendant of the crime charged against him.

2. The State of Tennessee has not been informed by counsel of any theory of defense in this case and is unaware, at this juncture in the proceedings, of any information in possession of the State which would exonerate the defendant. Upon receipt of a statement of the theory or basis of defense, the State will examine its file in the light of such statement and will make known to counsel for defendant such information as may exist which supports the theory of defense.

3. In the absence of such statement as to what theory the defense will rely upon, the State of Tennessee lacks sufficient information upon which to determine whether evidence in possession of the State is exculpatory and cannot comply with the vague requests of counsel for defense. In re Imbler, 60 Cal. 2d 554, 35 Cal. Rptr. 293, 387 P. 2d 6 (1963); U.S. vs. Agurs, 427 U. S. 97, 96 S. Ct. 2302, 49 L. Ed. 2d 302 (1976).

4. The State of Tennessee is fully cognizant of its duty to defendant to provide a fair trial. Brady vs. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); Mooney vs. Holohan, 294 U.S. 103, 55 S. Ct. 340, 79 L. Ed. 791; Napue vs. Illinois, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959). The State of Tennessee will fully comply with the requirements of the decisions cited herein; however, a criminal defendant has no constitutional or statutory right to discover before trial the contents of the prosecutions's file. U.S. vs. Agurs, supra; Hunter vs. State, 222 Tenn. 672, 440 S.W. 2d 1 (1969). Moreover, representatives of the State of Tennessee are under

no duty to report sua sponte to the defendant all they learn about the case and about their witnesses. In re Imbler, supra, there being no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case. Moore vs. Illinois, 408 U. S. 786, 92 S. Ct. 2562, 33 L. Ed. 2d 706; Giglio vs. U.S., 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972).

Respectfully submitted,

Thomas D. Henderson
Assistant District Attorney General

CERTIFICATE OF SERVICE

This is to certify that a true and exact copy of the foregoing response was caused to be delivered to Public Defender, counsel for the defendant, on February 11, 1998

Thomas D. Henderson
Assistant District Attorney General

IN THE CRIMINAL COURTS FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS
DIVISION VI

FILED
98 MAR -4 PM 12:28
WILLIAM R. KEY, CLERK
BY _____

STATE OF TENNESSEE

Plaintiff

VS.

MICHAEL RIMMER

Defendant

NO(S). 98-01034

MOTION TO DISMISS THE INDICTMENT DUE TO THE ILLEGALITY AND UNCONSTITUTIONALITY OF T.C.A. §§39-13-204 AND 39-13-206 AND THE IMPOSITION OF THE SENTENCE OF DEATH

Comes now the defendant through counsel and moves this Court to dismiss the indictment in this cause on the ground that T.C.A. §39-13-204 and T.C.A. §39-13-206, which allow for the imposition of the sentence of death upon conviction of murder in the first degree, violate the 5th, 6th, 8th and 14th Amendments to the United State Constitution, as well as Article I, Sections 8, 9, 10, 14 and 16 of the Tennessee Constitution and the Rules of Law as espoused and mandated by the United States Supreme Court for the following reasons:

GROUND 1. The requirement in T.C.A. §39-13-204(f) and (g) that the additional element of "Aggravating Circumstances" be proven beyond a reasonable doubt in a second proceeding after a conviction of first degree murder has in effect given the defendant a life sentence renders the statute unconstitutional as violating protections against double jeopardy.

GROUND 2. T.C.A. §39-13-204(c) permits the introduction of hearsay in the second stage of proceedings as evidence in the State's proof of aggravation or rebuttal of mitigation and thus violates the 5th, 8th, and 14th Amendments of the United States Constitution and Article I, Sections 16 and 8 of the Tennessee Constitution.

GROUND 3. The sentencing system provided in T.C.A. §39-13-204 is so vague, broad, and internally contradictory that it results in the arbitrary and capricious imposition of the death penalty in Tennessee in violation of the United States and Tennessee Constitutions.

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GROUND 4: T.C.A. §39-13-204(i)(7)'s provision for the imposition of a death penalty in convictions for murders that are not "Deliberate in Fact" constitutes "cruel and unusual punishment" and renders the statute unconstitutional.

GROUND 5: T.C.A. §39-13-204's provision for the infliction of death as a punishment for any conviction for murder is without justification and so severe as to constitute "cruel and unusual punishment" prohibited by the 8th and 14th Amendments to the United States Constitution and Article I, Section 16 of the Tennessee Constitution.

GROUND 6: T.C.A. §39-13-204 does not sufficiently narrow the population of defendants, convicted of first degree murder, who are eligible for a sentence of death in violation of the 8th, and 14th Amendments of the United States Constitution and Article I, Sections 16 and 8 of the Tennessee Constitution.

GROUND 7: T.C.A. §39-13-204 does not sufficiently limit the exercise of the jury's discretion because, once the jury finds aggravation, it can impose the sentence of death no matter what mitigation is shown, in violation of the 8th and 14th Amendments of the United States Constitution and Article I, Sections 16 and 8 of the Tennessee Constitution.

GROUND 8: T.C.A. §39-13-204 insufficiently limits the exercise of the jury's discretion by mandatorily requiring the jury to impose a sentence of death if it finds the aggravating circumstances to outweigh the mitigating circumstances in violation of the 8th and 14th Amendments of the United States Constitution and Article I, Sections 16 and 8 of the Tennessee Constitution.

GROUND 9: T.C.A. §39-13-204 does not require the jury to make the ultimate determination that death is appropriate in violation of the 8th and 14th amendments of the United States Constitution and Article I, Sections 16 and 8 of the Tennessee Constitution.

GROUND 10: T.C.A. §39-13-204 does not inform the jury of its ability to impose a life sentence out of mercy in violation of the 8th and 14th Amendments of the United States Constitution and Article I, Sections 16 and 8 of the Tennessee Constitution.

GROUND 11: T.C.A. §39-13-204 provides no requirement that the jury make findings of facts as to the presence or absence of mitigating circumstances, thereby preventing effective review on appeal under T.C.A. §39-13-206(c)(1) in violation of the defendant's 8th and 14th Amendment rights of the United States Constitution and Article I, Sections 16 and 8 of the Tennessee Constitution.

GROUND 12: T.C.A. §39-13-204(h) prohibits the jury from being informed of the consequences of its failure to reach a unanimous verdict in the penalty phase in violation of the 5th, 6th, 8th and 14th Amendments of the United States Constitution and Article I, Sections 10, 9, 16 and 8 of the Tennessee Constitution.

GROUND 13: The imposition of the sentence of death pursuant to T.C.A. §39-13-204 by electrocution is cruel and unusual in violation of the 8th and 14th Amendments of the United States Constitution and Article I, Section 16 of the Tennessee Constitution.

GROUND 14: The imposition of the sentence of death pursuant to T.C.A. §39-13-204 violates the 8th and 14th Amendments of the United States Constitution, and Article I,

Sections 16 and 8 of the Tennessee Constitution because it has been imposed discriminatorily in this state on the basis of race, sex geographic region in the state, economic and political status of the defendant.

GROUND 15: The proportionality and arbitrariness review conducted by the Tennessee Supreme Court pursuant to T.C.A. §39-13-206 is inadequate and deficient in violation of the 8th and 14th Amendments of the United States Constitution and Article I, Sections 16 and 8 of the Tennessee Constitution.

GROUND 16: T.C.A. §39-13-204(d) allows the State to make final closing arguments to the jury in the penalty phase in violation of the defendant's right to due process of law and effective assistance of counsel as guaranteed by the 5th, 6th and 14th Amendments to the United States Constitution and Article I, Sections 8, and 9 of the Tennessee Constitution.

WHEREFORE, the defendant prays that he be allowed to present evidence in support of each and every allegation included in this Motion to dismiss and that this Court find T.C.A. §39-13-204 and T.C.A. §39-13-206 which allow for the imposition of the sentence of death in Tennessee, to be unconstitutional and thereupon dismiss the indictment herein.

Respectfully submitted,

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been delivered to the Office of the District Attorney General this the 4 day of March 19 98.

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

2515B/26-28

IN THE CRIMINAL COURTS FOR THE THIRTIETH JUDICIAL
DISTRICT AT MEMPHIS
DIVISION VI

STATE OF TENNESSEE	*	
	*	
Plaintiff	*	
	*	
	*	
VS.	*	NO(S). 98-01034
	*	
	*	
MICHAEL RIMMER	*	
	*	
Defendant	*	

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS THE INDICTMENT DUE TO THE ILLEGALITY AND UNCONSTITUTIONALITY OF T.C.A. §39-13-204 AND §39-13-206 AND THE IMPOSITION OF THE SENTENCE OF DEATH

Comes now the defendant through counsel and moves this Court to dismiss the indictment in this cause on the ground that T.C.A. §39-13-204 and T.C.A §39-13-206 as applied to this defendant violates his state and federal constitutional rights for the following reasons:

INTRODUCTION:

While the Tennessee capital punishment statute is a collection of various provisions taken from the Georgia, Florida, and Texas capital punishment statutes, the Tennessee statute as a whole differs in important respects from each of those so-called "constitutional" statutes so as to render the Tennessee statute unconstitutional.

After ruling in July, 1976 that the procedures in the Georgia capital punishment statute were permissible under the Furman v. Georgia, 408 U.S. 238 (1972), decision, the United States Supreme Court, most importantly pointed out that it did "not intend to suggest that ... any sentencing system constructed along these general lines would inevitably satisfy the concerns of Furman, for each distinct system must be examined on an individual basis." Gregg v. Georgia, 428 U.S. 153, 195 (1976). This ruling

by the Supreme Court, coupled with the fact that the Tennessee statute differs in important ways from the systems approved by the Court in Gregg v. Georgia, supra, Proffitt v. Florida, 428 U.S. 242 (1976), and Jurek v. Texas, 428 U.S. 262 (1976), mandates that the Tennessee statute be closely examined and its constitutionality questioned. Under such an examination, the defendant contends that the death penalty statute in Tennessee does not pass constitutional muster. The statute violates numerous rights protected by the United States and Tennessee Constitutions, as well as the rules of law espoused and mandated by the United States Supreme Court in the Furman, supra, and Gregg, supra, group of decisions.

CAPITAL PUNISHMENT LAWS:

The Tennessee Law Compared to the Georgia, Florida and Texas Laws.

The first and most important difference between the Tennessee death penalty law and the death penalty law in other states is the effect the Tennessee statute has in operation of imposing an "automatic life sentence" upon the defendant at the conclusion of the first stage of proceedings, if the jury finds the defendant guilty of first degree murder. Indeed, it is difficult to avoid the conclusion that the legislature intended that this "automatic life sentence" for murder in the first degree be the law in Tennessee for the following four provisions in the Tennessee statute, taken together, impose in effect an "automatic life sentence" at the time the defendant is convicted of first degree murder:

T.C.A. §39-13-204(f)(1): If the jury unanimously determines that no statutory aggravating circumstances have been proven by the State beyond a reasonable doubt, the sentence shall be life imprisonment.

T.C.A. §39-13-204(f)(2): If the jury unanimously determines that a statutory aggravating circumstance or circumstances have been proven beyond a reasonable doubt, but that such circumstance or circumstances have not been proven by the State to outweigh any mitigating circumstance or circumstances beyond a reasonable doubt, the jury shall, in its considered discretion, sentence the defendant either to imprisonment for life without possibility of parole or imprisonment for life.

T.C.A. §39-13-204(h): If after further deliberations, the jury still cannot agree as to sentence, the judge shall dismiss the jury and the judge shall impose a sentence of life imprisonment.

> T.C.A. §39-13-206(d): In addition to its other authority regarding correction of errors, the Tennessee Supreme Court, in reviewing the death sentence for first degree murder, is authorized to: (1) Affirm the sentence of death; or (2) Modify the punishment to life imprisonment.
>
> T.C.A. §39-13-206(e): In the event that any provision of §39-13-202 - §39-13-205, or this section or the application thereof to any individual or circumstance is held to be invalid or unconstitutional by the Tennessee Supreme Court or a federal court, so as permanently to preclude a sentence of death as to that individual, the court having jurisdiction over such individual previously sentenced to death shall cause such individual to be brought before the proper court which shall, following a sentencing hearing in accordance with T.C.A. §39-13-207, sentence such person to imprisonment for life without possibility of parole or imprisonment for life.

If the State cannot carry its burden of proving aggravating circumstances beyond a reasonable doubt, the sentence remains at life; if the jury cannot agree on life imprisonment or death as a sentence, the sentence remains at life; and if there is either error in the sentencing proceeding or the death penalty is declared unconstitutional and void, again the sentence remains at life imprisonment. The obvious consequence of the Tennessee statute, therefore, is to impose upon the defendant an "automatic life sentence" at the moment he is found guilty of first degree murder.

The argument that if the Tennessee statute has this effect of imposing an "automatic life sentence" at the conclusion of the first stage of proceedings then the other statutes approved by the United States Supreme Court would have the same effect and have been found constitutional is not persuasive. While the defendant maintains that the Supreme Court did not even consider his problem in its review of the Georgia, Florida, and Texas statutes, if it had done so, several provisions in those acts, which are excluded from the Tennessee act, might protect those laws from constitutional violation.

THE GEORGIA STATUTE. The Georgia and Tennessee laws on capital punishment differ, most importantly, in that the Georgia statute requires not only an indictment for first degree murder, but, if the state is going to ask for the death penalty, there must be notice given to the defendant before the trial of any evidence of aggravating circumstances that will be alleged in order to justify a death sentence. Ga. Code Ann. 17-10-30 (1990).

The result is that at the end of the first stage of proceedings under the Georgia law, when the defendant is found guilty of first degree murder, there is no automatic life sentence because the defendant has been given prior notice that the state is asking for the death penalty for the crime committed. Further, there is no provision in the Georgia statute that provides, as does T.C.A. §39-13-206(e), that if any part of the statute is held to be unconstitutional then the defendant automatically receives a life sentence. The Tennessee statute's failure to require and provide for notice of evidence of aggravating circumstances before trial creates an automatic life sentence and as a result an unconstitutional law for reasons that will be later explained in detail.

THE FLORIDA STATUTE. When compared to the Florida capital punishment statute, the Tennessee death penalty law again differs in several important respects. Most importantly, the Florida system is trifurcated in that the jury first determines guilt, then serves in an advisory sentencing role, and then the trial judge sentences. The result is that there is no automatic life sentence imposed under the Florida law since the jury does not have authority to sentence the defendant. Fla. Stat. Ann. 921.141(2) (1991). Even if the jury does sentence the defendant, the judge has authority to reject the recommended sentence. Id. Finally, under the Florida system there is no mandatory death sentence upon a finding of aggravating circumstances as is found in T.C.A. §39-13-204(g). Id. Again, the above provisions found in the Florida statute protect it from constitutional violations; the absence of those provisions from the Tennessee statute result in several constitutional violations that will be outlined in detail later.

THE TEXAS STATUTE. The third statute reviewed by the Supreme Court was the Texas capital punishment statute. That statute effectively avoids the constitutional problems posed in the Tennessee statute by providing for a death penalty only in "capital murder" or what may be called "aggravated first degree murder" cases. Tex. Pen. Code 19.02 (1974). The alleged murderer in Texas

is indicted for facts that allege the elements of first degree murder plus aggravating circumstances. The purpose of the sentencing hearing is mainly to determine whether (1) the murder was deliberate, (2) the defendant poses a threat to society, and (3) any defenses are available. Tex. Code Crim. Proc., Art. 37.071 (Supp. 1975-6) (See Practice Commentary to Tex. Pen. Code 19.03 (1991) at (44).

In summary, while some of the provisions in the Tennessee capital punishment statute are taken from statutes that were at least tentatively approved as constitutional by the United States Supreme Court, the operative effect of the Tennessee statute taken as a whole is different and unconstitutional when compared to those other state laws. The Federal constitution is not ordinarily concerned with the forms of state procedure, but with their result. See, e.g., Chambers v. Mississippi, 410 U.S. 284, 302-03 (1973); Mempa v. Rhay, 389 U.S. 128, 135-37 (1967). The result of the Tennessee statute is violation of numerous constitutional rights and protections, federal and state, as well as the rules of law noted in the Supreme Court's recent rulings on capital punishment; and the Court will "nullify sophisticated as well as simple-minded modes" of producing unconstitutional consequences. Lane v. Wilson, 607 U.S. 268, 275 (1939). While the form of the Tennessee statute may be sophisticated, the consequence of the statute's imposing an "automatic life sentence" before the second proceeding under the statute begins is unconstitutional.

There being an automatic life sentence imposed upon a conviction for first degree murder in the first proceeding under the Tennessee statute, the defendant contends that the second proceeding must, therefore, be something other than a true sentencing hearing. The statute must create either (1) an enhancement of punishment proceeding, or (2) a trial for a separate and distinct crime of " aggravated first degree murder". As will be shown, the statute in its present form is unconstitutional if it has created either one of those two kinds of proceedings.

GROUND 1:

THE REQUIREMENT IN T.C.A. §39-13-204(f) AND (g) THAT THE ADDITIONAL ELEMENT OF "AGGRAVATING CIRCUMSTANCES" BE PROVED BEYOND A REASONABLE DOUBT IN A SECOND PROCEEDING AFTER A CONVICTION OF FIRST DEGREE MURDER HAS IN EFFECT GIVEN THE DEFENDANT A LIFE SENTENCE RENDERS THE STATUTE UNCONSTITUTIONAL AS VIOLATING PROTECTIONS AGAINST DOUBLE JEOPARDY.

If the statute does not create an enhancement of punishment proceeding, then it must have created a separate and distinct crime of "aggravated first degree murder" similar to "capital murder" in Texas. If the statute creates such a new crime, the conviction and automatic life sentence ends the first proceeding and what follows presents a violation of the double jeopardy provisions of both the United States and Tennessee Constitutions. U.S. Const., Amend. V and XIV; Tenn. Const., Art. I, Section 10.

The defendant contends that the required "proof beyond a reasonable doubt" of the additional fact of an aggravating circumstance or circumstances creates a crime distinct and separate from first degree murder just as effectively as does the required "proof beyond a reasonable doubt" of "premeditation" creates first degree murder as a distinct and separate crime from second degree murder. In fact, the crime of "aggravated murder in the first degree" is very similar in form to the crime of "aggravated assault". T.C.A. §39-2-101. This creation of a separate crime of "aggravated first degree murder", which would have to be considered a greater offense to first degree murder, poses a serious double jeopardy problem and conviction of the lesser included offense of first degree murder serves as an acquittal of the higher offense of "aggravated first degree murder". Cf., Robinson v. Neil, 366 F.Supp. 924, 927 (D.C. Tenn. 1973); Benton v. Maryland, 395 U.S. 784 (1969).

The Tennessee courts today generally utilize the "same evidence test" as do the majority of jurisdictions in the United States. Robinson v. Neil, supra at 927; Harris v. Washington, 404 U.S. 55 (1971); Jackson v. State, 540 S.W.2d 275 (Tenn. 1976). The "same evidence test" requires that each offense must entail the proof of an additional fact which the other does not to avoid a successful defense of former jeopardy.

Therefore, it becomes apparent that a conviction of a lesser included offense bars subsequent prosecution for the greater offense. Robinson v. Neil, supra. The bar accomplishes the intent of the double jeopardy clause:

> ... to prevent vexatious, piecemeal prosecution whether the result of an intent to harass, a desire to have more than one shot at obtaining a conviction or severe sentence, a mere prosecutorial caprice or carelessness. U.S. v. Engle, 485 F. 2d. 1021, 1025 (6th Cir. 1973).

This rule does not impose an undue hardship on the State; it merely requires that the prosecution of individuals accused of criminal activity be managed in such a way that those individuals are not forced to "climb a ladder" of multiple criminal prosecutions from the "least" included to the "greatest". The Tennessee capital punishment statute in providing that the accused shall first be convicted of first degree murder and given a life sentence and then be forced to "climb the ladder" to a second conviction of "aggravated first degree murder" and a death sentence violates the double jeopardy provisions of the United States and Tennessee Constitutions and renders the statute unconstitutional.

GROUND 2:

T.C.A. §39-13-204(c) PERMITS THE INTRODUCTION OF HEARSAY IN THE SECOND STAGE OF PROCEEDINGS AS EVIDENCE IN THE STATE'S PROOF OF AGGRAVATION OR REBUTTAL OF MITIGATION AND THUS VIOLATES THE 5TH, 8TH, AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9, 16, AND 8 OF THE TENNESSEE CONSTITUTION.

Since 1965 the Sixth Amendment to the United States Constitution, which requires that "in all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him," has been applicable to the States through the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400 (1965). The Tennessee Constitution provides a similar right "to meet witnesses face to face". Tenn. Const., Art. I, Section 9. The United States Supreme Court in Gregg v. Georgia, supra at 203, held that so long as the evidence introduced in the second proceeding does not "prejudice the defendant" it is preferable not to impose too many restrictions on this stage of proceedings. It is almost without question, though, that hearsay allowed by T.C.A. §39-13-204(c) to be introduced as justification for a death sentence will in fact

prejudice the defendant in that he may receive a death sentence based upon such hearsay.

Under the Georgia statute, the rules of evidence deny admission of hearsay; the Florida system, likewise, protects the defendant from prejudicial hearsay in that the judge sentences and not the jury; and in Texas the defendant is tried on "aggravated first degree murder" charges and the rules of evidence applied at trial do not admit ordinary hearsay evidence. Ga. Code Ann. §17-10-30 (1990); Fla. Stat. Ann. 921.141(2) (1991); Tex. Pen. Code 19.02 (1974). The important question presented by the Tennessee statute's allowance of hearsay is: How can an aggravating circumstance be proved beyond a reasonable doubt when such circumstance is only based on hearsay evidence? The defendant contends that a reasonable doubt as to "aggravating circumstances" will always remain if the proof presented involves ordinary hearsay.

T.C.A. §39-13-204(c) provides, in pertinent part:

> ...the defendant is accorded a fair opportunity to rebut any hearsay statements so admitted....

Evidence is admissible in the sentencing hearing, therefore, despite inadmissibility under the Rules of Evidence. Hearsay is specifically admissible.

Despite the fact that the 5th Amendment to the United States Constitution and Article I, Section 9 of the Tennessee Constitution provide to a criminal defendant the right to confront witnesses against him, T.C.A. §39-13-204(c) apparently suspends this constitutional protection in death penalty cases.

The defendant submits that T.C.A. §39-13-204(c) flies in the face of cases which impose the requirement of a heightened reliability in the sentencing procedure in which the sentence of death is an option. Woodson v. North Carolina, 428 U.S. 280 (1976); Spaziano v. Florida, 468 U.S. 447 (1984).

The defendant admits that the right of confrontation is basically a trial right, despite the enormous impact of sentencing upon one convicted of crime. Williams v. People of State of New York, 337 U.S. 241 (1949). However, the United States Supreme Court held in Specht v. Patterson, 386 U.S. 605 (1967), that the right of

confrontation does apply in sentencing which requires "new findings" of an "aggravating circumstance or circumstances". As a result the defendant contends that the Specht rule of law applies and that hearsay evidence should not be introduced against him at a sentencing hearing before a jury in a death penalty case. Conversely, however, due to the fact that this is a sentencing hearing and not a trial on guilt or innocence, and further due to the fact that the right of confrontation does not attach to the state, the defendant submits that hearsay evidence with other indicia of reliability should be allowed when offered by the defendant. Such a result was the holding of the Supreme Court of the State of Washington in State v. Bartholomew II, 683 P.2d 1079 (Wash. 1984).

In many instances, state courts have determined that rules of admissibility should be applied even more strictly, not less strictly, in a capital case than in a non-capital case. See, for example, People v. Devin, 444 N.E.2d 102 (Ill. 1982), in which the sentence of death was reversed after evidence of the defendant's hearsay boasts and descriptions of torture were admitted without adequate limiting instructions; State v. English, 367 So.2d 815 (La. 1979), in which the court found hearsay to be inadmissible to prove a prior conviction at the sentencing hearing in a death penalty trial; and, Porter v. State, 578 S.W.2d 742 (Tex.Cr.App. 1979), in which the Court held that hearsay evidence in the sentencing phase of a death penalty trial violated the defendant's right to confront witnesses against him and subsidiary rights to cross-examine, even though the hearsay fell within an exception, but otherwise demonstrated insufficient indicia for reliability.

In Tennessee cases upholding this hearsay provision, no inadmissible evidence was actually used against the defendant. See, State v. Austin, 618 S.W.2d 738 (Tenn. 1981); State v. Harries, 657 S.W.2d 414 (Tenn. 1983); State v. Teague II, 680 S.W.2d 785 (Tenn. 1984).

The Court has reversed two sentences because of improperly admitted hearsay and overly prejudicial evidence. In State v. Buck,

670 S.W.2d 600 (Tenn. 1984), the Court held that an FBI rap sheet is hearsay, deviously accurate, over prejudicial, not the best evidence and, thus, cannot be used to prove convictions. In State v. Sheffield, 676 S.W.2d 542 (Tenn. 1984), the prosecution read reports of prior arrests as if they were established facts and the Supreme Court held that the trial court should have balanced probativity against the great prejudice of this evidence that was admissible, if at all, only to impeach the defense expert.

We respectfully submit that under the Constitutions of the United States and Tennessee, and under recent Supreme Court rulings, the admission of hearsay against the defendant in a first degree murder trial at the sentencing stage, especially when the defendant has not even been given notice of the hearsay that will be offered to support a death sentence, violates the defendant's right of confrontation, prejudices him, and renders T.C.A. §39-13-204 unconstitutional.

GROUND 3:

THE SENTENCING SYSTEM PROVIDED IN T.C.A. §39-13-204 IS SO VAGUE, BROAD, AND INTERNALLY CONTRADICTORY THAT IT RESULTS IN THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY IN TENNESSEE IN VIOLATION OF THE UNITED STATES AND TENNESSEE CONSTITUTIONS.

The Tennessee death penalty statute's "standards" for guiding juries is both creative and confusing. The test that must be completed by a jury in Tennessee before the death penalty can be imposed is not found in any of the other state statutes reviewed by the United States Supreme Court and, therefore, approval of those statutes cannot be relied upon to prove the Tennessee statute's constitutionality. Overall, the serious question presented by the Tennessee statute's sentencing standards is: What are those standards?

T.C.A. §39-13-204(e) provides the first standard for guiding jury discretion in capital cases:

> After closing arguments in the sentencing hearing, the trial judge shall include in his instructions for the jury to weigh and consider any of the statutory aggravating circumstances set forth in subsection (i) which may be raised by the evidence at either the guilt or sentencing hearing, or both. The trial judge shall also include in the instructions for the jury to weigh and consider any mitigating circumstances raised by the evidence at either

> the guilt or sentencing hearing or both which shall include, but not be limited to, those circumstances set forth in subsection (j). No distinction shall be made between mitigating circumstances as set forth in subsection (j) and those otherwise raised by the evidence which are specifically requested by either the state or the defense to be instructed to the jury...

T.C.A. §39-13-204(f), on the other hand, provides that the jury should weigh aggravating circumstances which it finds unanimously have been proven beyond a reasonable doubt with mitigating circumstances:

> T.C.A. §39-13-204(f)(1): If the jury unanimously determines that no statutory aggravating circumstances have been proven by the state beyond a reasonable doubt, the sentence shall be imprisonment for life.
>
> T.C.A. §39-13-204(f)(2): If the jury unanimously determines that a statutory aggravating circumstance or circumstances have been proven by the State beyond a reasonable doubt, but that such circumstance or circumstances have not been proven by the State to outweigh any mitigating circumstance or circumstances beyond a reasonable doubt, the jury shall, in its considered discretion, sentence the defendant either to imprisonment for life without possibility of parole or imprisonment for life.

Another contradiction found in the statute is the requirement of a unanimous jury verdict before a life sentence can be imposed. T.C.A. §39-13-204(f). However, T.C.A. §39-13-204(h) directly contradicts T.C.A. §39-13-204(f) in that it provides that if there is no unanimity that the trial judge will impose a life sentence anyway.

The defendant further contends that the terms of aggravating circumstances 2, 3, and 5 in T.C.A. §39-13-204(i) are so vague and overbroad as to effectively be no standards at all and allow juries to impose the death sentence in which ever cases they arbitrarily choose to do so. Those aggravating circumstances are that:

> (2). The defendant was previously convicted of one (1) or more felonies, other than the present charge, whose statutory elements involve the use of violence to the person;
>
> (3). The defendant knowingly created a great risk of death to two (2) or more persons, other than the victim murdered, during the act of murder...
>
> (5). The murder was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death...

Circumstance (2) does not indicate whether felonies which

may be a part of the same transaction as the present murder charge may constitute "previous convictions". Circumstance (3) is particularly susceptible to an overly broad interpretation by juries when it speaks of "a great risk of death to two or more persons", and the terms "heinous, atrocious, or cruel" found in Circumstance (5) are also so vague as to result in arbitrary jury sentencing too. It is important to note that in the Georgia, Florida, and Texas capital punishment cases the Supreme Court admitted that most of the same above-named "aggravating circumstances" would be vague and overbroad in violation of the United States Constitution if it were not for the Supreme Court decisions in each of those states that had already interpreted the terms narrowly. Gregg v. Georgia, supra at 210. There being no similar interpretive rulings on the Tennessee statute's vague terms, the statute must be rendered unconstitutional.

The Supreme Court has held that a statute is unconstitutional if its words describe "no comprehensible course of conduct at all". Generally, the defendant contends that the vague as well as contradictory standards found in the Tennessee statute as outlined above constitute "no comprehensible course of conduct at all" and the statute, therefore, violates the United States and Tennessee Constitutions' provisions against cruel and unusual punishment and guarantees of due process of law.

GROUND 4:

T.C.A. §39-13-204(i)(7)'s PROVISION FOR THE IMPOSITION OF A DEATH PENALTY IN CONVICTIONS FOR MURDERS THAT ARE NOT "DELIBERATE IN FACT" CONSTITUTES "CRUEL AND UNUSUAL PUNISHMENT" AND RENDERS THE STATUTE UNCONSTITUTIONAL.

The United States Supreme Court in Gregg v. Georgia, supra at 187, stated that it was concerned in its ruling only with capital punishment for murder "when a life has been taken deliberately by the offender" (emphasis added). T.C.A. §39-13-204(i)(7) provides for capital punishment in felony-murder cases where the "deliberateness" is created not by fact but by law. The defendant contends that this is not "deliberate murder" and results in what the Supreme Court would find to be "invariably disproportionate

punishment" and, thereby, cruel and unusual punishment in violation of the Constitutions of the United States and Tennessee. U.S. Const., Amend. V and XIV; Tenn. Const., Art. I, Section 16.

GROUND 5:

T.C.A. §39-13-204 PROVISION FOR THE INFLICTION OF DEATH AS A PUNISHMENT FOR ANY CONVICTION FOR MURDER IS WITHOUT JUSTIFICATION AND SO SEVERE AS TO CONSTITUTE "CRUEL AND UNUSUAL PUNISHMENT" PROHIBITED BY THE 8TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE TENNESSEE CONSTITUTION.

The United States Supreme Court concluded in 1976 that the "infliction of death as a punishment for murder is not without justification and thus not unconstitutionally severe". Gregg v. Georgia, supra at 187. However, the Court reached that conclusion only "in the absence of more convincing evidence" that the death penalty is cruel and unusual punishment. Gregg v. Georgia, supra. Today the defendant contends there is more convincing evidence that (1) the death penalty has no proven deterrent effect; (2) alternative punishments are just as effective as capital punishment and make the death penalty so severe as to be cruel and unusual punishment; (3) risk of irrevocable mistake in capital punishment is too high; (4) retribution is not a legitimate justification for using the death penalty; (5) an informed public would be opposed to the death penalty; and (6) that empirical evidence indicates that the death penalty is in fact cruel and unusual punishment. Capital Punishment in the United States (H. Bedau and C. Pierce ed. 1976).

Notwithstanding the continuing dissents of Justices Brennan and Marshall, who continue to find the sentence of death to be unconstitutional per se, the United States Supreme Court has been unwilling to find that capital punishment is a per se violation of the 8th Amendment. See, for example, Furman v. Georgia, supra. Likewise, notwithstanding the dissent of Justice Brock, the Tennessee Supreme Court has not yet been willing to find the sentence of death to be a per se violation of Article 1, Section 16 of the Tennessee Constitution. See, for example, State v. Dicks, 615 S.W.2d 126 (Tenn. 1981).

Nevertheless, a worldwide trend continues moving away from the death penalty as a sentencing alternative. The death penalty is no longer in effect in all of Western Europe. The United States appears to be the last major democracy that continues to impose the sentence of death. In point of fact, only 12 states in the United States have actually executed anyone since Furman v. Georgia, supra, and, although there are over 2,000 people on death rows across the country, only 103, as of November 28, 1988, have been executed since Furman (1972). Statistics courtesy of the NAACP Legal Defense and Education Fund, Inc., circa November 28, 1988. It might be that some day in the future the Tennessee State Supreme Court will reconsider its position and collectively change its mind.

In District Attorney v. Watson, 411 N.E.2d 1274 (Mass. 1980), the court found that the penalty of death is cruel, arbitrary and discriminatory. It has an unparalled effect on the defendant's rights, the court concluded, and may frustrate justice if the law is not changed and, because defendants are dead, cannot be applied retroactively. Citing Furman, the Watson court pointed out that for the state to kill denies the defendant's humanity, and that the penalty inflicts unique and inherent psychic and physical pain. Citing statistics on race from Florida, Georgia, Texas and Ohio, as well as the fact that some potential jurors in Massachusetts are also racists, the Watson court found the penalty inevitably arbitrary.

In Commonwealth v. O'Neal, 327 N.E.2d 662, 339 N.E.2d 667 (Mass. 1975), compelling statistics were cited concerning the failure of the death penalty to deter future homicide. The rule in Enmund v. Florida, 458 U.S. 782 (1982), hold that the death penalty is improper for a defendant convicted of felony murder, who does not intend to kill nor participate in the actual murder, since such a penalty can have no deterrent effect. An extension of the Enmund logic, compels a conclusion that if the death penalty does not have a deterrent effect in any event then it should be constitutionally prohibited.

Notwithstanding the accumulating and persuasive evidence that the death penalty has no deterrent effect, the Tennessee Supreme Court has ruled that evidence of its value as a deterrent is properly excludable from the jury. State v. Johnson (Cecil), 632 S.W.2d 542 (Tenn. 1982). To date, the Tennessee Supreme Court has concluded that whether a state will or will not have a death penalty is a question for the legislature, not the courts. State v. Austin, 618 S.W.2d 738 (Tenn. 1981).

Based on the aforesaid grounds and such other evidence as may be presented in court, the defendant submits that the Tennessee capital punishment statute constitutes "cruel and unusual punishment" and should be struck down as unconstitutional.

GROUND 6:

T.C.A. §39-2-204 DOES NOT SUFFICIENTLY NARROW THE POPULATION OF DEFENDANTS, CONVICTED OF FIRST DEGREE MURDER, WHO ARE ELIGIBLE FOR A SENTENCE OF DEATH IN VIOLATION OF THE 8TH, AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTIONS 16 AND 8 OF THE TENNESSEE CONSTITUTION

The prosecution in a death penalty case must establish two separate elements before a defendant is eligible for a death penalty under the 8th Amendment. First of all, the defendant must be found legally guilty of intentional murder. Coker v. Georgia, 433 U.S. 584 (1977). Secondly, the prosecution must prove that the defendant is, in some specific way, i.e., by proving the application of a statutory aggravating circumstance, more culpable than the larger class of defendants who are simply guilty of first degree murder. Godfrey v. Georgia, 446 U.S. 420 (1980); Presnell v. Georgia, 439 U.S. 14 (1978). In Zant v. Stephens, 462 U.S. 862 (1983), the court found that a statutory aggravating circumstance must be specific enough to "genuinely narrow the class of persons eligible for the death penalty" 462 U.S. at 877, in order for a statutory aggravating circumstance to satisfy the 8th Amendment of the United States Constitution.

The defendant here respectfully contends that the broad scope of the aggravating circumstances at T.C.A. §39-2-204(i) do not sufficiently limit the exercise of the jury's discretion and thus does not adequately limit that population of defendants convicted of

first degree murder who are eligible for the sentence of death.

For example, it is possible under this statute for a defendant to be convicted of felony murder and, thus eligible for the sentence of death, and then proceed into a sentencing hearing in which the state proves the single aggravating circumstance found at T.C.A. §39-13-204(i)(7), i.e., "the murder was committed while the defendant was engaged in committing ... (an underlying felony)". Thus, the only aggravating circumstance found to apply to this hypothetical defendant would require no additional proof subsequent to the guilt phase of the trial and would not, in any way, "narrow" the definition of those persons convicted of first degree murder who are eligible for the sentence of death.

GROUND 7:

T.C.A. §39-13-204 DOES NOT SUFFICIENTLY LIMIT THE EXERCISE OF THE JURY'S DISCRETION BECAUSE, ONCE THE JURY FINDS AGGRAVATION, IT CAN IMPOSE THE SENTENCE OF DEATH NO MATTER WHAT MITIGATION IS SHOWN, IN VIOLATION OF THE 8TH AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITITUTION AND ARTICLE 1, SECTIONS 16 AND 8 OF THE TENNESSEE CONSTITUTION

The statutory scheme reguires the exercise of "threshold" discretion in making the determination of matters in aggravation. But, once aggravation is found, the jury's discretion is no longer limited. The defendant submits that this limitation is insufficient in the 8th Amendment sense.

In Zant v. Stephens, supra, the court rejected the argument that "the mandate of Furman is violated by a scheme that permits the jury to exercise unbridled discretion", once it passes the threshold decision of finding an aggravating circumstance. 462 U.S. at 875. Zant pointed out that Gregg v. Georgia, supra, had approved a sentencing scheme which, like Tennessee's, allowed the reguirement of only such "threshold" discretion.

Nevertheless, such logic invites the unfair result that occurred in State v. Adkins II, 725 S.W.2d 660 (Tenn. 1987) in which the jury questioned during deliberation whether they were obligated to impose death if they failed to find a mitigating factor. The guestion would not have been asked had the jury not wanted to give life. The Tennessee court did not agree that the jury was asking whether a death sentence was mandatory. The jury

ultimately imposed a sentence of death. See also, State v. Dicks, 615 S.W.2d 126 (Tenn. 1981).

GROUND 8:

T.C.A. §39-13-204 INSUFFICIENTLY LIMITS THE EXERCISE OF THE JURY'S DISCRETION BY MANDATORILY REQUIRING THE JURY TO IMPOSE A SENTENCE OF DEATH IF IT FINDS THE AGGRAVATING CIRCUMSTANCES TO OUTWEIGH THE MITIGATING CIRCUMSTANCES IN VIOLATION OF THE 8TH AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 16 AND 8 OF THE TENNESSEE CONSTITUTION

> T.C.A. §39-13-204(g) provides: If the jury unanimously determines that: (i) At least one (1) statutory aggravating circumstance or several statutory aggravating circumstances have been proven by the state beyond a reasonable doubt, and (ii) such circumstance or circumstances have been proven by the state to outweigh any mitigating circumstances beyond a reasonable doubt, the sentence shall be death.... (emphasis added).

Tennessee juries in death penalty cases, therefore, are instructed that if they find the aggravating circumstances to outweigh the mitigating circumstances they must impose a sentence of death.

The defendant respectfully submits that this limitation impermissibly relegates the jury to a more limited role than the 8th Amendment requires it to play. A jury must always be free to confront the ultimate question of whether "death is the appropriate punishment" in the specific case. Jurors may disagree concerning what mitigating circumstances they deem are appropriate but yet may, nevertheless, believe, based upon the evidence properly produced, that death is not the appropriate sentence. The mandatory requirement that they impose a sentence of death if they find, collectively, that the aggravating circumstances outweigh the mitigating circumstances discourages the jurors from making the final ultimate determination that the sentence of death is the appropriate sentence in the specific case, all things being considered.

Previous United States Supreme Court opinions suggests that the jury must be allowed to be free to confront the ultimate question whether death is the appropriate punishment in the specific case. Lockett v. Ohio, 438 U.S. 586 at 601 (1978), quoting Woodson v. North Carolina, 428 U.S. 280 at 305 (1976). See the dissenting opinion of Justices Marshall and Brennan from the denial of a

petition for a Writ of Certiorari in the Tennessee case of State v. Teague, 473 U.S. 911 (1985).

In Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860 (1988), the United States Supreme Court considered a case in which the jury instructions and the verdict form, which could have lead the jurors to believe that only those mitigating circumstances could be considered, which were unanimously found by the jury to exist, and found that the instructions and the verdict form were in violation of the 8th Amendment reguiring the vacation of the death penalty and a re-sentencing hearing. The Supreme Court found that the procedure followed in that case was constitutionally inadeguate because the jurors were prohibited from weighing mitigating circumstances that they had not unanimously agreed upon against aggravating circumstances that they had agreed upon. It was the opinion of the court that such procedure was constitutionally infirm due to the likelihood that it may have limited the jury's ability to freely exercise its discretion concerning the ultimate guestion of whether death is the appropriate punishment considering all circumstances. The defendant sees the same potential in the language guoted above from T.C.A. §39-13-204(g).

Furthermore, T.C.A. §39-13-204, couched as it is in mandatory language, i.e., "... sentence shall be death...", also violates the principal of Woodson v. North Carolina, 428 U.S. 280 (1976), which prohibited the mandatory imposition of the sentence of death. The mandatory nature of the language limits the exercise of a Tennessee jury's discretion to a constitutionally excessive extent.

GROUND 9:

T.C.A. §39-13-204 DOES NOT REQUIRE THE JURY TO MAKE THE ULTIMATE DETERMINATION THAT DEATH IS APPROPRIATE IN VIOLATION OF THE 8TH AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 16 AND 8 OF THE TENNESSEE CONSTITUTION

The ultimate guestion of the sentencing phase is the question of whether death is the appropriate penalty. T.C.A. §39-13-204 requires the jury to determine and compare aggravating and mitigating circumstances. The jury is instructed that their conclusion as to whether this sentence of life or death should be

imposed is merely a matter of filling in the blanks in the aggravation/mitigation formula. If aggravation is not outweighed by mitigation, according to the statute, then death is appropriate - end of inquiry. However, the legislature is not sitting in the courtroom, and cannot hear the nuances of testimony and cannot observe the defendant's demeanor. The jury is peculiarly eligible to make the required individualized finding of which verdict is the most suitable in the case at hand. Individual jurors may perceive mitigating circumstances, although based upon evidence adduced in the courtroom, that is not even perhaps articulable by the individual juror, and thus cannot be framed into a "mitigating circumstance".

As was previously pointed out, the Supreme Court for the state of Utah was persuaded by this reasoning and required that a death sentence ought not be imposed where, in the final analysis, there is a reasonable doubt that it should be. State v. Wood, 648 P.2d 71 (Utah 1982). See also, Clines v. State, 656 S.W.2d 684 at 686 (Ark. 1983) in which the court was construing a statute which required the jury to give life, if death is inappropriate, even if aggravation outweighs mitigation; Ferguson v. State, 417 So.2d 639 (Fla. 1982), in which the court found that aggravation and mitigation must be weighed with a view toward the ultimate determination of whether death is the appropriate penalty; and, State v. McDougall, 301 S.E.2d 308 at 324 (N.C. 1983), in which the court required that the jury must find that death is the appropriate sentence beyond a reasonable doubt. See also, Scott v. State, 338 S.W.2d 581 (Tenn. 1960); and Dykes v. State, 296 S.W.2d 861 (Tenn. 1956).

GROUND 10:

T.C.A. §39-13-204 DOES NOT INFORM THE JURY OF ITS ABILITY TO IMPOSE A LIFE SENTENCE OUT OF MERCY IN VIOLATION OF THE 8TH AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 16 AND 8 OF THE TENNESSEE CONSTITUTION

The Tennessee Supreme Court has found that the jury is free to exercise mercy in determining the sentence. The jury is not, however, told explicitly of this freedom. Nor, according to this court, should it be; the court says that the jury's ability to impose life out of mercy is incorporated into the mitigating circumstances. See, State v. Melson, 638 S.W.2d 342 (Tenn. 1982).

In Melson, the court also stated that the jury should not be told that it can give life without finding a mitigating factor, because this is untrue. Thus, mercy in Tennessee cases comes into play only when the defendant produces evidence of something sufficiently weighty to counteract the aggravation attending the killing. In fact, the instructions impel the jury to the conclusion that its deliberations are to be cool, controlled and contained - it must simply find various factors, accord some weight to each and add them up like a mathematical formula. The jury is not told, for example, that the individual jurors can consider their own personal overall impressions that they have formed of the defendant and his demeanor over the course of the trial in determining whether to give life or death. See the authority cited in Issue No. 12 above for the proposition that the jury has the right and obligation, if it chooses to impose the sentence of death, that it must in the final analysis determine that death is the appropriate penalty, all things considered; and on Issue No. 11 concerning the limitation on the jury's consideration of non-statutory mitigating circumstances.

GROUND 11:

T.C.A. §39-13-204 PROVIDES NO REQUIREMENT THAT THE JURY MAKE FINDINGS OF FACTS AS TO THE PRESENCE OR ABSENCE OF MITIGATING CIRCUMSTANCES, THEREBY PREVENTING EFFECTIVE REVIEW ON APPEAL UNDER T.C.A. §39-13-206(c) (1) IN VIOLATION OF THE DEFENDANT'S 8TH AND 14TH AMENDMENT RIGHTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 16 AND 8 OF THE TENNESSEE CONSTITUTION

T.C.A. §39-13-204(g)(1) requires the jury verdict to list aggravating factors found, and whether or not they are outweighed by mitigating factors. The statute does not, however, require that the mitigating factors found need be specified.

T.C.A. §39-13-206 provides that there is an automatic appeal directly to the Tennessee Supreme Court upon the imposition

of the sentence of death. At subsection (c) (1), it further provides that in reviewing the sentence of death, the Tennessee Supreme Court shall determine whether:

> (A) The sentence of death was imposed in any arbitrary fashion; ....
>
> (C) The evidence supports the jury's finding that the aggravating circumstance or circumstances outweigh any mitigating circumstances; and
>
> (D) The sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant.

The Tennessee State Supreme Court in State v. Melson, supra, held that the failure of T.C.A. §39-13-204 to require the jury to specify any mitigating circumstances is a safeguard for the defendant, since it allows the jury to give any weight it likes to what (the court implies) may be inadequate mitigation. The Supreme Court concludes that the defendant can rely upon that court to ensure that the verdict properly reflects the mitigation shown at trial. Query: How can the Supreme Court review the sentence of death as mandated pursuant to T.C.A. §39-13-206(c)(1) unless it knows with some specificity what mitigating factors were found by the jury.

To a certain extent, it is true, as the court concludes in Melson that, if the jury felt required to state its reasons for giving life, it might be persuaded from predicating its verdict based upon amorphous mitigation. This problem could be cured, however, if the jury, as argued above, were merely told that it has the final responsibility to determine the appropriate punishment, notwithstanding the formula requiring the comparison of aggravation and mitigation. In other words, in order to ensure more accurate and meaningful review by the Supreme Court, the jury could be instructed to list any mitigating factors it found applicable to the defendant; and, the jury could also be instructed that they can impose the sentence of life if, under the total circumstances, they conclude that life is the appropriate sentence, notwithstanding the formalistic determination of aggravation versus mitigation.

It is also noted, that the requirement that the jury state aggravating, but not mitigating, factors further adds to the

importance in the juror's eyes of aggravation as opposed to mitigation. Secondly, and similarly, the requirement that the jury specifically identify the aggravating circumstances that it has found tends to cause the jurors to spend more deliberation time on aggravation and give more thought to aggravation than to mitigation. Thirdly, the court cannot adequately review the verdict without knowing whether the jury actually considers the mitigating factors adduced by the evidence.

Finally, it is interesting to note that the Supreme Court reassures the defendant that an appropriate review will be conducted by that court. However, in the death penalty cases that have been reviewed by the Tennessee Supreme Court from 1977 to date (August, 1993), the sentence of death has never been set aside on the grounds of arbitrariness or disproportionality, notwithstanding T.C.A. §39-13-206(c)(1) and (4). (Now T.C.A. §39-13-206(c)(1)(A) and (D)).

GROUND 12:

T.C.A. §39-13-204(h) PROHIBITS THE JURY FROM BEING INFORMED OF THE CONSEQUENCES OF ITS FAILURE TO REACH A UNANIMOUS VERDICT IN THE PENALTY PHASE IN VIOLATION OF THE 5TH, 6TH, 8TH AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 10, 9, 16 AND 8 OF THE TENNESSEE CONSTITUTION

> T.C.A. §39-13-204 provides in pertinent part: (h) If the jury cannot ultimately agree as to punishment, the judge shall dismiss the jury and the judge shall impose a sentence of life imprisonment. The judge shall not instruct the jury, nor shall the attorneys be permitted to comment at any time to the jury, on the effect of the jury's failure to agree on a punishment.

A hung jury results in an automatic life sentence - not a retrial. However, the statute requires that this information be kept from the jury. The Tennessee Supreme Court has thus far found this information irrelevant as an "after-effect" of the deliberations. See, Houston v. State, supra; and, State v. Buck, 670 S.W.2d 600 (Tenn. 1984). In the Buck case, one of the grounds of reversal was the fact that the prosecutor informed the jury that a hung jury results in an automatic life sentence.

Logic dictates to the defendant that this is unconstitutionally to his detriment. Each juror is deprived of the knowledge that he or she alone can stand between the defendant and the electric chair with the mistaken belief that a hung jury means

retrial on the question of life or death. A juror may vote for death for the erroneous purpose of avoiding the expense and inconvenience of a retrial. See, for example, State v. Williams, 392 So.2d 619 (La. 1980), in which the court pointed to the reliability constraints imposed by Lockett, Gardner, and Woodson, and found that without a non-unanimity instruction the jury's discretion would be insufficiently guided. In accord, see, State v. Loyd, 459 So.2d 498 (La. 1984) in which the absence of such a non-unanimity instruction was found to be reversible error.

GROUND 13:

THE IMPOSITION OF THE SENTENCE OF DEATH PURSUANT TO T.C.A. §39-13-204 BY ELECTROCUTION IS CRUEL AND UNUSUAL IN VIOLATION OF THE 8TH AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE TENNESSEE CONSTITUTION

Although the Tennessee Supreme Court has rejected the argument that the method of killing by electrocution is cruel and unusual, State v. Caldwell, 671 S.W.2d 459 (Tenn. 1984), the more recent opinion from Justice Brennan in his dissent from a denial for a petition for a writ of certiorari in Glass v. Louisiana, 105 S.Ct. 2159 (1985) is instructive.

In Glass, Justice Brennan concludes that electrocution, as a method of execution, is cruel and unusual. He describes in graphic detail accounted versions of the horror and the cruelty of execution by electrocution and concludes that it violates the 8th Amendment prohibition against cruel and unusual punishment.

GROUND 14:

THE IMPOSITION OF THE SENTENCE OF DEATH PURSUANT TO T.C.A. §39-13-204 VIOLATES THE 8TH AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 16 AND 8 OF THE TENNESSEE CONSTITUTION BECAUSE IT HAS BEEN IMPOSED DISCRIMINATORILY IN THIS STATE ON THE BASIS OF RACE, SEX, GEOGRAPHIC REGION IN THE STATE, ECONOMIC AND POLITICAL STATUS OF THE DEFENDANT

Since Furman was decided in 1972, the United States Supreme Court has held that the 8th Amendment of the United States Constitution requires that stricter procedural safeguards be applied in capital cases in order to assure heightened sentencing reliability; that is to say, in order to minimize the risk of the arbitrary, capricious or discriminatory application of the death

sentence. The evidence continues to accumulate, at least in jurisdictions other than Tennessee where a competent investigation has not been made, that the state legislatures and the state criminal juries have, in fact, been unable to minimize the risk of the arbitrary, capricious or discriminatory application of the death sentence. See, for example, McCleskey v. Kemp, 481 U.S. 279, (1987); and W. Bowers, G. Pierce and J. McDevitt, Legal Homicide, Death as Punishment in America (1984).

Notwithstanding the constitutional mandate that the death penalty shall not be imposed in an arbitrary, capricious or discriminatory manner, no objective and comprehensive study has been conducted within the state for the purpose of quantitatively and qualitatively evaluating the exercise of discretion by the sentencing authority and other entities throughout the criminal justice system within which the decision is made to impose the sentence of death. Since no study has been conducted, it is impossible for the imposition of the death penalty in this state to be tested by state and federal constitutional standards as a result of the unavailability of applicable demographic and statistical data relevant to the individual cases pending before our courts.

Claims of discrimination, arbitrariness or disproportionality raised by counsel have summarily been dismissed due to the unavailability of supporting factual data. The state courts have also consistently refused requests from counsel for the provision of funds in order that the necessary studies may be conducted.

T.C.A. §39-13-206, nevertheless, specifically requires the Tennessee Supreme Court to review the sentence of death in every case to determine if it is excessive due to arbitrariness and disproportionality. In the some 65 or so death penalty cases that have been reviewed by the Tennessee Supreme Court since 1977, the sentence of death has never been set aside on the grounds of disproportionality.

GROUND 15:

THE PROPORTIONALITY AND ARBITRARINESS REVIEW CONDUCTED BY THE TENNESSEE SUPREME COURT PURSUANT TO T.C.A. §39-13-206 IS INADEQUATE AND DEFICIENT IN VIOLATION OF THE 8TH AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 16 AND 8 OF THE TENNESSEE CONSTITUTION

T.C.A. §39-13-206 requires the Tennessee Supreme Court to provide an automatic review of any sentence of death imposed. T.C.A. §39-13-206(c)(1) requires that in the reviewing process the court shall determine whether:

(A) The sentence of death was imposed in any arbitrary fashion;

....

(D) The sentence of death is excessive or disporportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant.

The Tennessee Supreme Court has held that the review process mandated at T.C.A. §39-13-206 is constitutionally adequate. State v. Groseclose, 615 S.W.2d 142 (Tenn. 1981).

The defendant submits that the proportionality review process is specifically deficient and inadequate for the following reasons:

(a) There is no uniform state-wide procedure for collecting and evaluating data concerning the disposition of first degree murder cases.

(b) Despite the mandate of Supreme Court Rule 12, the information collected in the Rule 12 form from the trial judges state-wide is inadequate, the quality of the information included in them tends to be scientifically inaccurate and imprecise and the judges have not submitted the report in every case as required by the rule.

(c) The jury verdict form mandated by T.C.A. §39-13-204 does not allow the jury to report mitigating circumstances found during the course of its deliberation.

(d) It is impossible for the Supreme Court to apply the legislative mandate to individual cases until sufficient cases are reported to make comparison meaningful. The closer the review conducted by the Supreme Court is in time to the promulgation of T.C.A. §39-13-206 in 1977, the less meaningful the review would be.

(e) Many defendants indicted for murder in the first degree are for reasons unknown and unavailable to the Supreme Court

not included, including those charges where the punishment is less than life imprisonment, thereby depriving the Supreme Court of information which is vital to the analysis required by the act.

In Pulley v. Harris, 465 U.S. 37 (1984), the United States Supreme Court held that a comparative proportionality review of death sentences was not required by the 8th Amendment to the United States Constitution. The United States Supreme Court in Pulley was considering a California case. California had (and has) no statute requiring proportionality review by its highest court, as does Tennessee, and for that reason, the defendant submits, that the rule of Pulley v. Harris, is not dispositive of a request for an adequate proportionality review in this state.

By creating the statutory requirement that a proportionality review be conducted by the Tennessee State Supreme Court of sentences of death imposed in this state, the state has created a constitutional right that the proportionality review be conducted consistent with the elements of due process. A state creates a protected liberty interest by placing substantive limitations on official discretion. See, for example, Olim v. Wakinkona, 461 U.S. 238 (1983); Connecticut Board of Pardons v. Dumshat, 452 U.S. 458 (1981); See also, Ford v. Wainwright, 477 U.S. 399 (1986).

Notwithstanding any effect that Pulley v. Harris may have, it continues to remain that effective appellate review of death penalty sentences is ultimately required to ensure that the sentencer has not overstepped it bounds and arbitrarily imposed a death sentence. Godrey v. Georgia, 466 U.S. 1001 (1980). It is the state's obligation to administer its capital sentencing procedures with an even hand. Proffitt v. Florida, 428 U.S. 242 at 250 (1976).

In Gregg v. Georgia, supra, the court stated:

> [P]roportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury. If a time comes when juries generally do not impose the death sentence in a certain kind of murder case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death.

428 U.S. at 206.

The Tennessee review provisions were adopted from the parallel provisions of the death penalty statute affirmed in Gregg v. Georgia, supra. The United States Supreme Court found those provisions to be critical to the statute's attempt to avoid the arbitrary imposition of the death penalty.

T.C.A. §39-13-206 created a new kind of appellate procedure. Unlike its Georgia counterpart, however, there is no provision for a process by which the court can gather the information with which to make the required determination. The Georgia statute provided for hiring an attorney and staff to assist the court in compiling "the records of all capital felony cases in which sentence was imposed after January 1, 1970" with "whatever extracted information [the court] desires with respect [to these cases] ... including ... a synopsis or brief of the facts in the record concerning the crime and the defendant." Ga. Code Ann. §17-10-37(a). The Tennessee statute provides for none of these functions and for no one to perform them.

Both the plurality and the concurring opinions in Gregg emphasize that the Georgia Supreme Court is able to consider "all felony cases" whether they result in the imposition of a death or a life sentence. Gregg v. Georgia, 428 U.S. at 204 n. 56, 233 n.11. The Supreme Court in Gregg took note of the standards that the Georgia court had developed by examining the actions of "juries generally throughout the state" in given types of cases, and noted particular cases in which the Georgia court concluded from that examination that death was a disproportionate sentence. Gregg v. Georgia, 428 U.S. at 224. Moreover, the court recognized that it "was necessary at the inception of the new procedure" to consider the actions of juries and cases decided before the enactment of the new law, in order to have an adequate base for comparison. Gregg v. Georgia, 428 U.S. 204 n.56.

The Tennessee Supreme Court is reguired to make the same kind of determination, but without any procedure enabling it to do so. Tennessee Supreme Court Rule 12 requires trial judges to file questionnaires concerning all first-degree murder cases under the

current death penalty statute in which life imprisonment or a death sentence is imposed. However, the questionnaires completed by the various trial judges across the state offer little, if any, consistent, accurate or complete information and have, in a significant number of cases, not been completed for first degree murder cases preceding the effective date of Rule 12. Moreover, the questionnaire provides inconsistent, incomplete information for each case. While the trial judge is not required to provide a complete summary of the relevant facts, particular facts are selectively requested - for example, a description on how the victim was harmed or tortured.

Because there is no comprehensive data-collecting mechanism, the court must rely on the ability of defense counsel to locate, read, digest and present in briefs and in argument some larger class of "similar cases" from which the court can make a more meaningful determination of proportionality. This procedure is unlikely to enable the court to proceed with an efficient, fair, or reliable sentence review and counsel rarely even makes an attempt to produce such data. Haphazard research through newspaper articles and personal inquiries by individual counsel in a given case may provide the court with a slightly broader picture, but it would still be strongly skewed by the counsel's lack of resources, personal contact, access to information without compulsory process, access to expertise in sociological data studies, and inability to compress whole biographies and case histories into a form that the court can be expected to read or hear within the confines of appellate briefing and argument. The awesome responsibility placed on the court by the statute and the constitutional requirements that it is designed to satisfy require a more fair and reliable review procedure.

It is noted that a request was made by counsel in State v. Adkins II, 725 S.W.2d 660 (Tenn. 1987) for discovery of dispositions of all first degree murder charges since 1977 within the state of Tennessee. The denial of this request by the trial court was affirmed by the Tennessee State Supreme Court, which

opined that it had enough information with which to conduct the proportionality review.

Consideration of any mitigating factors is a fundamental part of any decision on whether to inflict the death penalty.

> [T]he fundamental respect for humanity underlying the 8th Amendment ... requires consideration of the character and record of the individual offender and the circumstances of the particular offense is a constitutionally indispensable part of the process of inflicting the penalty of death.

Woodson v. North Carolina, 428 U.S. at 304.

In Presnell v. Georgia, supra, 439 U.S. at 16, the Court found applicable to a death penalty holding its earlier language in Cole v. Arkansas, 333 U.S. 196 at 201-202 (1968):

> To conform to due process of law, petitioners are entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court.

The principal of due process applies with equal force to the sentencing phase of a death penalty case.

Since T.C.A. §39-13-204 does not permit the jury to specify the mitigating factors it considered, the court cannot know which factors played a role in this decision. Although the Rule 12 report must list the mitigating factors that the trial judge thought were present, there is no way to know whether the jury actually ever considered the factors identified by the Court. (The Rule 12 report form is set up verbatim in Tennessee Supreme Court Rule 12.) For the Supreme Court to assume that the trial court's findings on mitigation are the same as those of the jury - an assumption that is at best unreasonable, at worst absurd - the judge cannot have known what was in the jury's mind; nor can the reviewing court. Failure to report the mitigating factors considered by the jury, therefore, invites arbitrary and freakish application of the death sentence.

What exactly the Tennessee Supreme Court does to review the proportionality of death sentences pursuant to T.C.A. §39-13-206(c)(1) is a complete mystery. The death penalty opinions filed by that court allow us no insight into their proportionality review. The opinions reflect at best a conclusory statement that the sentence imposed was not disproportional. We do know, however,

that there is no comprehensive data base upon which a confident evaluation of the proportionality of the imposition of the sentence of death can be made and we also know that of the 65 or so death penalty cases that have been reviewed by the Tennessee Supreme Court since 1977, when T.C.A. §39-13-206, (now 39-13-206), was promulgated, to the present, December 1988, the sentence of death has never been set aside on the grounds of disproportionality.

Find below a partial list of cases from other states in which the appellate courts have set aside the sentence of death on the grounds of disproportionality:

1. State v. Watson, 628 P.2d 943 (Ariz. 1981). The defendant was a model prisoner, tried to further education while in prison, was 21 years of age at the time of the killing, the victim shot first, the co-defendant received a life sentence. The sentence of death was reduced after death was imposed for the third time.

2. State v. Valencia, 645 P.2d 239 (Ariz. 1982). The defendant was 16 years of age at the time of the offense. The sentence of death was reduced to life.

3. Sumlin v. State, 617 S.W.2d 372 (Ark. 1981). Significant disparity existed between co-defendants, including the fact that the co-defendant who got a life sentence was actually the killer. The sentence of death reduced to life.

4. People v. Dillion, 668 P.2d 697 (Cal. 1983). This was a felony murder in which the underlying felony was an attempted robbery of a marijuana field. The defendant was 17, unusually immature, had no prior trouble with the law, thought his life was in danger from the man guarding the marijuana crop with shotgun and there were six other participants who received lighter sentences.

5. Menendez v. State, 368 So.2d 1278 (Fla. 1979). The defendant had no significant history of criminal activity and a strong potential for rehabilitation.

6. Goodwin v. State, 405 So.2d 170 (Fla. 1981). The defendant was an accomplice but not present at the scene. The defendant was also dominated by the actual assailant.

7. Ross v. State, 474 So.2d 1170, (Fla. 1985). The defendant was intoxicated and alcoholic. The homicide arose out of a domestic dispute and the defendant had no prior record of violence.

8. Carruthers v. State, 465 So.2d 496 (Fla. 1985). The state proved one aggravating circumstance in the face of several mitigating factors (only one statutory), including a voluntary confession by the defendant.

9. State v. Scroggins, 716 P.2d 1152 (Idaho 1985). The defendant was not the actual killer and did not rape the victim (although he tried). The defendant was also 18 years of age, but had a mental age of 13.8 years. It was also demonstrated that the defendant had a troubled and chaotic childhood.

10. State v. Windsor, 716 P.2d 1182 (Idaho 1985). Another case in which the sentence of death was reduced, involving a case in which the defendant was not the actual assailant.

11. State v. Commonwealth, 634 S.W.2d 411 (Ky. 1982). Another case in which the defendant was not the actual assailant, the trial judge foreclosed jury consideration of the death penalty because the triggerman had previously plead and received 20 years. The decision of the trial court was affirmed.

12. Coleman v. State, 378 So.2d 640 (Miss. 1979). Defendant was 16 years of age when the offense occurred. Did not shoot first and could have shot a witness, but fled instead.

13. Edwards v. State, 441 So.2d 84 (Miss. 1983). A sentence of death was set aside where the evidence of the defendant's mental illness was overwhelming.

14. State v. McIlvoy, 629 S.W. 2d 333 (Mo. 1982). A contract killing case in which the solicitor got life, the sentence of the hired killer was reduced from death to life.

15. Biondi v. State, 699 P.2d 1062 (Nev. 1985). This case involved a bar room confrontation between intoxicated and emotional strangers. A co-defendant was allowed to plead and get life. The defendant's sentence of death was reduced even though he had one prior conviction for armed robbery.

16. State v. Bondurant, 309 S.E.2d 170 (N.C. 1983). Although the facts involved a relatively heinous offense, the sentence of death was reduced because the defendant was intoxicated, was immediately remorseful and concerned and had no motive for the killing. The jury had disregarded his claim that the killing was an accident.

17. State v. Hill, 319 S.E.2d 163 (N.C. 1984). The sentence of death was set aside in a case in which the defendant had no past criminal activity, was gainfully employed and cooperated during the investigation.

19. State v. Young, 325 S.E.2d 181 (N.C. 1985). The sentence of death was set aside in a case in which the defendant was 19 years of age at the time of the offense. He had been involved in a robbery murder with two other defendants.

20. Burrows v. State, 640 P.2d 533 (Okla. Cr. 1982). The Court found that the mitigation outweighed the aggravation in a wife murder case and reduced the sentence of death.

20. Parker v. Dugger, 111 S. Ct. 731 (1991). The United States Supreme Court held that the Appellate Court, in a State that weighs aggravating and mitigating circumstances, may consider the entire record at trial, review the aggravating and mitigating circumstances, and sentence anew.

GROUND 16:

T.C.A. §39-13-204(d) ALLOWS THE STATE TO MAKE FINAL CLOSING ARGUMENTS TO THE JURY IN THE PENALTY PHASE IN VIOLATION OF THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW AND EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE 5TH, 6TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 8, AND 9 OF THE TENNESSEE CONSTITUTION.

> T.C.A. §39-2-203 provides, in pertinent part: (d) In the sentencing proceeding, the state shall be allowed to make a closing argument to the jury; and then the attorney for the defendant shall also be allowed such argument, with the state having the right of closing.

Due to the heightened standard of due process and the heightened standard of reliability that attaches in a death penalty sentencing hearing; and, further due to the fact that the defendant's life is at stake, the defendant respectfully submits that he, through counsel if he chooses, should be allowed to argue

to the jury last. Thus far the Tennessee State Supreme Court disagrees with this argument. State v. Melson, 638 S.W.2d 342 (Tenn. 1982). But see, Herring v. New York, 422 U.S. 853 (1975); and Gardner v. Florida, 430 U.S. 349 (1977).

The defendant respectfully submits that, since studies have shown that there is an inherent advantage in having the final jury argument, this advantage should be afforded to the defendant - whose life hinges on the jury's decision.

CONCLUSION

The Tennessee capital punishment statute is a collection of different parts of three statutes reviewed and found constitutional, at least on Eighth Amendment grounds, by the United States Supreme Court. The Tennessee statute is uniquely different from each of those so-called "constitutional" statutes, though, in that it expanded, excluded, or confused important parts of the sentencing systems for murder cases found in those other statutes. The result is a Tennessee law that is constitutionally intolerable. The statute violates the defendant's right to have notice of the charges against him, right to confrontation, right to due process and equal protection of the laws; and, most importantly, the statute violates the defendant's constitutional protections against cruel and unusual punishments. For the foregoing reasons the defendant respectfully submits that the indictment in this case should be dismissed and the imposition of the sentence of death prohibited due to the fact that T.C.A. §§39-13-204 and 39-13-206 violate the defendant's state and federal constitutional rights.

Respectfully submitted,

RONALD JOHNSON
ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been delivered to the Office of the District Attorney General this the 4 day of March, 19 98

RONALD JOHNSON
ATTORNEY FOR DEFENDANT

2515B/29-62

IN THE CRIMINAL COURTS FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS
DIVISION VI

FILED
98 MAR -4 PM 12:28
WILLIAM R. KEY, CLERK
BY _____

STATE OF TENNESSEE *
*
Plaintiff *
*
*
VS. * NO(S). 98-01034
*
MICHAEL RIMMER *
*
*
Defendant. *

MOTION FOR INDIVIDUAL VOIR DIRE

Now comes the accused in the above named case and moves this Court to allow counsel to voir dire the prospective jurors individually, separate and apart each from the other. In support of his motion, the accused shows the Court:

I.

Collective voir dire of jurors in panels as to their familiarity with the crime, the victim or the probability of accused's guilt or innocence, will educate all jurors to prejudicial and incompetent material, thereby rendering it impossible to select a fair and impartial jury.

II.

The issues in the case require that the voir dire include sensitive and potentially embarrassing questions exploring the prospective juror's bias or prejudice toward the psychiatric profession, or psychological practitioner.

III.

Collective voir dire of jurors in panels will preclude the candor and honesty on the part of the jurors which is necessary in order for counsel to intelligently exercise their peremptory challenges.

The State is expected to qualify the jury as to their

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conscientious belief regarding capital punishment. Collective voir dire on that subject will tend to exclude from the jury persons with ambivalent feelings toward the death penalty, as the prospective jurors will not know the specificity and certainty required to be disqualified under the Witherspoon rule. Prospective jurors will merely see other persons excused for conscientious opposition to the death penalty, and will assert their own ambiguous belief either from a sense of duty or to be excused from jury service.

IV.

When it is believed that there is a significant possibility that prospective jurors have been exposed to potentially prejudicial information, individual voir dire is mandated. Potentially prejudicial information includes, but is not limited to, publicity of the present case, knowledge that the defendant has been convicted or accused of other crimes, or preformed opinions of the defendant's guilt or innocence.

WHEREFORE, the accused prays that the Court order an individual voir dire, with each prospective juror examined separately and privately. In the alternative, the accused prays that the Court order an individual voir dire on the issues of pre-trial publicity and opposition to the death penalty.

Respectfully submitted,

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been delivered to the office of the District Attorney General this the 4 day of March, 19 96.

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

2515B/63-64

IN THE CRIMINAL COURTS FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS
DIVISION VI

FILED
98 MAR -4 PM 12:28
WILLIAM R. KEY, CLERK
BY _____

STATE OF TENNESSEE *
*
Plaintiff *
*
*
VS. * NO(S). 98-01034
*
*
MICHAEL RIMMER *
*
*
Defendant *

BRIEF IN SUPPORT OF ACCUSED'S MOTION FOR INDIVIDUAL VOIR DIRE

The accused has moved this Court to allow counsel to voir dire the prospective jurors individually, separate and apart each from the others in support of this motion, the accused would submit the following:

> "The Court, upon motion of a party or on its own motion, may direct that any portion of the questioning of a prospective juror be conducted out of the presence of the tentatively selected jurors and other prospective jurors." (Tenn. R. Cr. Proc., Rule 24A).

I.

A defendant is entitled to an impartial jury to try him on any indictment or presentment made against him. Art. 1, §9, Tenn. Constitution. The Tennessee Court of Criminal Appeals has indicated that the Tenn. R. Cr. Proc. contemplate avoiding any problems of "community thought". Smith v. State, 554 S.W. 2d 648, 651 (Tn. Cr. App. 1977). "(T)he right of trial by jury, unimpaired and without violation...manifestly means that the right shall never be embarrassed or encumbered with conditions which, in their practical operation, may impair or violate the free and full enjoyment of the right." Neely v. State, 63 Tenn. (4 Baxter) 174, 184 (1874).

II.

It is the purpose of voir dire examination to allow counsel to become acquainted with the qualifications, interests, or biases

of jurors. Smith v. State, 327 S.W. 2d 308 (1959); Wallis v. State, 546 S.W. 2d 244 (Tn. Cr. App. 1976). Questioning individual jurors and receiving individual responses allows the attorney to assess more subtle aspects of a prospective juror's attitudes, interests, and reactions. A question put to a large group of panelists reveals only that a certain number of jurors raised their hands or shook their heads.

III.

The inherent nature of a possible death penalty demands that special care be taken in empaneling the jury, for "the penalty of death is qualitatively different from a sentence of imprisonment . . . (and) (b)ecause of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case". Woodson v. North Carolina, 428 U.S. 280, 305.

IV.

In determining whether the death penalty is appropriate, "one of the most important functions any jury can perform . . . is to maintain a link between contemporary community values and the penal system - a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society'". Witherspoon v. Illinois, 391 U.S., 510, 519 n. 15 (1968).

V.

If there is a significant possibility that a juror has been exposed to potentially prejudicial matter, the examination of such juror as to the exposure shall take place outside the presence of other chosen or prospective jurors. Sommerville v. State, 521 S.W. 2d 792 (Tenn. 1975). This is known as the Sommerville rule. This rule has been affirmed by the Tennessee Courts on several occasions. State v. Simon, 635 S.W. 2d 498 (Tenn. 1982); State v. Burton, 751 S.W. 2d 440 (Tenn. Crim. App. 1987); State v. Porterfield, 746 S.W. 2d 441 (Tenn. 1988). Individual voir dire is mandated when there is a significant possibility that prospective jurors have been exposed to potentially prejudicial material. Burton, 751 S.W. 2d at 440. The necessity that the Sommerville rule

be followed in all criminal cases should be obvious, but it is imperative when a defendant is on trial for his life. State v. Claybrook, 736 S.W. 2d 95 (Tenn. 1987). Since the defendant in every criminal case is entitled to have his guilt or innocence determined by an unbiased and impartial jury, the Sommerville rule is necessary to guarantee this right to a fair trial. Claybrook, 736 S.W. 2d at 100.

VI.

The Supreme Court of California has held that the portion of voir dire which deals with issues involving death-qualifying the jury should be done individually and in sequestration. Hovey v. Superior Court of Alameda County, 168 Cal. Rptr. 128 (1980). When death-qualifying a jury, group voir dire inclines jurors to become more favorable to the prosecution than if a more refined technique were used. Hovey, 168 Cal. Rptr. at 174. The process focuses attention on the penalty before the accused has been found guilty. Id. As a result of this focus on the penalty phase, some jurors may be more likely to believe the accused is guilty. Id. The California Supreme Court stated that modern psychological theory suggests several reasons to anticipate this result. Id.

Repeated displays of concern for the jurors feelings about the death penalty may prompt jurors to infer that the court and counsel assumes the penalty phase will occur. Hovey, 168 Cal Rptr. at 175. Jurors have reason to infer that the judge and attorneys personally believe the accused to be guilty. Id. If a juror is predisposed to expect a guilty verdict, he will more readily arrive at the conclusion that the evidence presented is proof beyond a reasonable doubt. Id. at 176. Therefore, a capital jury which is predisposed to the belief that the accused is guilty in advance of trial is unlikely to function properly or maintain its neutrality. Id. In addition, jurors are repeatedly asked to think about the penalty decision they may be called upon to make. Id. at 178. The death penalty may be more readily given "because of the repeated exposure to the idea of taking a life". Hovey, 168 Cal. Rptr. at 178. The California Supreme Court looked at a psychological study of the death-qualifying process, which determined that the process

for selecting capital jurors creates certain "side effects" which predispose a juror's attitude toward the death penalty. Id. at 180. The court should and must be concerned about the threat these procedures present to an accused's constitutionally protected interests in a fair trial. Id.

The California Supreme Court held, as this court should, that the most practical and effective procedure available to minimize these effects of death-qualifying jurors is individual sequestered voir dire. Hovey, 168 Cal. Rptr. at 181. "Such a reduction in the pretrial emphasis on the penalty phase should minimize the tendency of a death-qualified jury to presume guilt and expect conviction." Id. at 181. The California Supreme Court points to other benefits such as jurors being more forthright and revealing in their responses. Id. at 181, n. 134.

The accused in the case at bar respectfully asks this Honorable Court to hold as the California Supreme Court held. Sequestered voir dire will minimize jurors' exposure to the death-qualifying of other jurors. Trial courts must be sure to safeguard the "neutrality, diversity, and integrity of the jury to which society has entrusted the ultimate responsibility for life or death". Hovey, 168 Cal. Rptr. at 182.

VII.

Collective voir dire of jurors as to their familiarity with the crime, the victim or the probability of defendant's guilt or innocence, will expose all jurors to prejudicial and incompetent material, thereby rendering it impossible to select a fair and impartial jury. Collective voir dire in panels will preclude the candor and honesty on the part of the jurors which is necessary for counsel to intelligently exercise their peremptory challenges. Individual voir dire is recommended particularly when many jurors express a belief as to the defendant's guilt. Dukes v. State, 578 S.W. 2d 659 (Tenn. Cr. App. 1978).

Collective voir dire on conscientious beliefs regarding capital punishment will tend to exclude from the jury persons with ambivalent feelings toward the death penalty, as the prospective jurors will not know the specificity and certainly required to be

disqualified under the Witherspoon rule. Prospective jurors will merely see other persons excused for conscientious opposition to the death penalty and will assert their own ambiguous beliefs eithers from a sense of duty or then be excused from jury service.

In addressing the role of the jury at the close of a trial, the Tennessee Supreme Court noted that "when the effort to secure a verdict reaches the point that a single juror may be coerced into surrendering view conscientiously entertained, the jury province is invaded . . ." Kersey v. State, 525 S.W. 2d 139, 144 (1975). This regard for the sanctity of the jury should be present at the beginning of the trial as well.

VIII.

In the alternative, the accused has moved for partial individual voir dire. In State v. Melson, 638 S.W. 2d 342 (Tenn. 1982), the trial judge allowed individual voir dire as the effect of publicity and the jurors' views on the death penalty. When initial voir dire indicated a possible problem, individual voir dire was allowed on issues of pre-trial publicity and opposition to the death penalty. State v. Caruthers, 676 S.W. 2d 935 (Tenn. 1984).

Due to the publicity that all capital murder cases receive, the accused respectfully asks that this Court allow individual voir dire on the issue of pre-trial publicity. In addition, the accused asks this Court to allow individual voir dire on the issue of opposition to the death penalty.

Respectfully submitted,

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been delivered

to the office of the District Attorney General this the 4

day of March, 1998.

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

2515B/65-70

IN THE CRIMINAL COURT OF TENNESSEE
THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS

Division Six

STATE OF TENNESSEE
vs

INDICTMENT: 98-01033-34

Michael D. Rimmer

RESPONSE OF THE STATE OF TENNESSEE
TO MOTION FOR INDIVIDUAL VOIR DIRE OF JURORS

For answer to the motion of defendant for separate or individual voir dire of jurors, the State submits the following:

1. Because the law relative to (a) the criminal statute allegedly violated, (b) the presumption of innocence, (c) the burden of proof, and (d) credibility of witnesses must be the basis of questions to each prospective juror, individual questioning would be repetitious and involve undue expenditure of judicial time without commensurate protection of any right due the defendant. See State vs. Workman, 667 S.W. 2d 44 (1984).

2. The defendant has advanced no substantive statutory or constitutional right which could be protected by such novel procedure.

3. The defendant has advanced no basis for prejudice or sympathy in the community which would require adoption of a procedure of jury selection so improvident with regard to judicial time and the number of other cases awaiting adjudication.

WHEREFORE, PREMISES CONSIDERED, the State of Tennessee respectfully moves that the motion of defendant be dismissed.

Respectfully submitted,

Thomas D. Henderson
Assistant District Attorney General

CERTIFICATE OF SERVICE

This is to certify that a true and exact copy of the foregoing response was caused to be delivered to Public Defender, counsel for the defendant, on February 11, 1998

Thomas D. Henderson
Assistant District Attorney General

IN THE CRIMINAL COURTS FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS
DIVISION VI

FILED
98 MAR -4 PM 12:28
WILLIAM R. KEY, CLERK
BY _____

STATE OF TENNESSEE *
*
Plaintiff *
*
*
VS. * NO(S). 98-01034
*
*
MICHAEL RIMMER *
*
*
*
Defendant *

MOTION OF THE ACCUSED TO REQUIRE COURT TO CHARGE PRESUMPTION OF LIFE SENTENCE, LIFE WITHOUT POSSIBILITY OF PAROLE, AND DEATH SENTENCE

Comes now the accused in the above styled and numbered cause and would show that he has been indicted under the captioned indictment number for the offense of Murder in the First Degree.

He would move the Court to charge the jury that they are to presume that a life sentence, a life sentence without possibility of parole, or a death sentence will be carried out in accordance with the laws of the State. Tenn. Code Ann. 39-13-204(e)(2), (Supp. 1995). Otherwise, there is a substantial probability that the jurors will speculate based upon unrelated cases which have received widespread publicity, that life imprisonment or life imprisonment without possibility of parole would mean that the prisoner would be released in a few years or that a sentence of death would never be carried out due to the alleged "leniency" of courts and elected officials. State v. Taylor, 771 S.W. 2d 387 (Tenn. 1989). Because the effect of the verdict is not proper for jury consideration, Edwards v. State, 540 S.W. 2d 641 (Tenn. 1976), the accused respectfully moves this Honorable Court to charge the jury to presume that their verdict will be carried out in accordance with the law of the State.

M15

98

WHEREFORE, the accused respectfully moves this Honorable Court to grant the relief requested.

Respectfully submitted,

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been delivered to the office of the District Attorney General this the 4 day of March, 1998.

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

2515B/71-72

IN THE CRIMINAL COURT OF TENNESSEE
THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS

Division Six

STATE OF TENNESSEE

vs

INDICTMENT: 98-01033-34

Michael D. Rimmer

RESPONSE OF THE STATE OF TENNESSEE
TO MOTION OF DEFENDANT TO REQUIRE COURT TO CHARGE
PRESUMPTION OF LIFE SENTENCE AND DEATH SENTENCE

In response to the motion of defendant to require the Court to charge presumption of life sentence and death sentence, the State would respectfully submit as follows:

1. The State respectfully denies the factual allegations in said motion and would demand strict proof thereof.

2. The State respectfully submits that the Court should not charge the jury in accordance with the request by the defense since the Court would be charging the jury to presume things that are not true.

3. The State would respectfully submit that the motion should be denied since there is no authority to charge the requested instruction.

WHEREFORE, the State of Tennessee respectfully submits that the motion of defendant to require the Court to charge presumption of life sentence and death sentence should be denied.

Respectfully submitted,

Thomas D. Henderson
Assistant District Attorney General

CERTIFICATE OF SERVICE

This is to certify that a true and exact copy of the foregoing response was caused to be delivered to Public Defender, counsel for the defendant, on February 11, 1998

Thomas D. Henderson
Assistant District Attorney General

IN THE CRIMINAL COURTS FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS
DIVISION VI

FILED
98 MAR -4 PM 12:28
WILLIAM R. KEY, CLERK
BY_____

STATE OF TENNESSEE

Plaintiff

VS.

MICHAEL RIMMER

Defendant

NO(S). 98-01034

MOTION FOR ARREST HISTORIES OF ALL POTENTIAL STATE WITNESSES

Comes now the accused and moves this Honorable Court in its discretion to order the State to furnish accused's counsel the arrest histories of all potential State witnesses in this cause.

The accused would show that:

1. A trial court, in its discretion, may require the government, prior to trial, to furnish to the defense criminal records of prosecution's intended witnesses. United States v. Turner, 423 F. Supp. 957 (1976).

2. The accused, under the discretion of the court should receive the arrest histories based on notions of fundamental fairness and in the interest of justice in a death penalty case. State v. Irick, 762 S.W. 2d 121 (Tenn. 1988).

3. Due process imposes on the prosecution an obligation to disclose favorable evidence. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963).

4. He is entitled to such information under the Eighth Amendment to the United States Constitution and Article I, §XVI of the Tennessee Constitution and under the Fourteenth Amendment to the United States Constitution and Article I, §VIII of the Tennessee Constitution.

M16

WHEREFORE, the accused moves this Court to order the District Attorney General to make available to counsel for the defendant the arrest histories of all potential State witnesses in this case.

Respectfully submitted,

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been delivered to the Office of the District Attorney General this the 4 day of March, 19 98.

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

2515B/73-74

IN THE CRIMINAL COURT OF TENNESSEE
THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS

Division Six

FILED
98 MAR 16 AM 9:02
WILLIAM K. KEY, CLERK
BY

STATE OF TENNESSEE

vs

INDICTMENT: 98-01033-34

Michael D. Rimmer

RESPONSE OF THE STATE OF TENNESSEE
TO DEFENDANT'S MOTION FOR ARREST HISTORIES
OF ALL POTENTIAL STATE WITNESSES

In response to the defendant's motion for arrest histories of all potential State witnesses, the State of Tennessee would state to the Court:

1. The defendant is not entitled to the information requested pursuant to T.C.A. Section 40-32-101. This section is codified in the chapter on destruction of records upon dismissal or acquittal and is clearly not a discovery rule. The clear intention of the legislature is to provide that if such information is discoverable then this statute will not prohibit its discovery.

2. Such information is not discoverable pursuant to the case of State v. Brown, 552 S.W. 2d 383, since the information in the Brown case was information solely under the control of the State of Tennessee and was related to an issue directly in issue during the course of that trial. Also see State v. Baker, 623 S.W. 2d 132 (Tenn. Crim. App. 1981).

3. The State has no duty to furnish such arrest histories, according to State v. Workman, 666 S.W. 2d 44 (Tenn. 1984).

4. The defense has given no indication of what issue such information would be relevant to: and in the absence of any statement of what their defense is, the State would submit that the request is entirely frivolous, irrelevant and immaterial.

WHEREFORE, the State of Tennessee respectfully submits that the motion for arrest histories of all potential State witnesses should be denied.

Respectfully submitted,

Thomas D. Henderson
Assistant District Attorney General

CERTIFICATE OF SERVICE

This is to certify that a true and exact copy of the foregoing response was caused to be delivered to Public Defender, counsel for the defendant, on February 11, 1998

Thomas D. Henderson
Assistant District Attorney General

IN THE CRIMINAL COURTS FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS
DIVISION VI

FILED
98 MAR -4 PM 12:28
WILLIAM R. KEY, CLERK
BY _____

STATE OF TENNESSEE

Plaintiff

VS.

MICHAEL RIMMER

Defendant

NO(S). 98-01034

MOTION FOR SEPARATE JURIES

The accused, by counsel moves this Court to afford the accused with separate procedures for the determination of innocence or guilt and for sentencing.

The accused is entitled to a bifucated trial should the jury find him guilty of first degree murder. Tenn. Code Ann. 39-13-204(a).

1. The accused is charged with murder in the first degree, and under the Tennessee Code Annotated, Section 39-13-204(a), is entitled to separate procedures for the determination of guilt or innocence and the punishment.

2. The accused, by counsel moves, in the event the jury find the defendant guilty of murder in the first degree, the Court discharge the jury which has decided the issue of guilt and select a separate jury to set the punishment.

3. The Tennessee Statute requiring the same jury to decide the issue of guilt or innocence and to fix the punishment on conviction for the crime of murder in the first degree is unconstitutional and contrary to Amendments 6 and 14 of the United States Constitution and Article I, §§ VIII and IX of the Constitution of the State of Tennessee because it deprives the accused of a trial by jury representative of a cross section of the

M17

community, and it results in a jury that is conviction prone.

Further, the accused moves that the Court prohibit the State from qualifying venire persons at the guilt stage of the trial about their scruples against the death penalty and that no prospective juror be excluded on any broader basis than an inability to follow the law relating to the guilt or innocence of the accused and to abide by his oath.

WHEREFORE, the accused moves this Court to order the State to grant the relief requested.

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing Motion has been delivered to the office of the District Attorney General this the 4 day of March, 19 95.

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

2515B/75-76

IN THE CRIMINAL COURT OF TENNESSEE
THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS

Division Six

STATE OF TENNESSEE

vs

INDICTMENT: 98-01033-34

Michael D. Rimmer

RESPONSE OF THE STATE OF TENNESSEE
TO MOTION FOR SEPARATE JURIES

In response to the Motion for Separate Juries, the State would respectfully submit as follows:

1. The motion should be denied because of a failure to state a claim upon which relief may be granted. There is absolutely no authority for the procedure requested by the defense: and, in fact, a trial by two separate juries could constitute double jeopardy.

2. The procedure requested by counsel for the defendant will be in direct violation of the statutes and laws of the State of Tennessee and accordingly should not be granted.

WHEREFORE, the State of Tennessee respectfully submits that the Motion for Separate Juries should be denied.

Respectfully submitted,

Thomas D. Henderson
Assistant District Attorney General

CERTIFICATE OF SERVICE

This is to certify that a true and exact copy of the foregoing response was caused to be delivered to Public Defender, counsel for the defendant, on February 11, 1998

Thomas D. Henderson
Assistant District Attorney General

IN THE CRIMINAL COURTS FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS
DIVISION VI

FILED
98 MAR -4 PM 12:28
WILLIAM R. KEY, CLERK
BY

STATE OF TENNESSEE *
*
Plaintiff *
*
*
VS. * NO(S). 98-01034
*
*
MICHAEL RIMMER *
*
*
*
Defendant *

MOTION FOR A PRE-TRIAL MORGAN HEARING

The accused, by counsel, moves this Court to conduct Pre-trial Morgan hearings on the use, by the State, of prior convictions and specific instances of conduct of the accused.

1. The accused requests a hearing out of the presence of the jury, to determine what, if any, of the accused's prior criminal record can be used by the State for the purpose of impeaching the accused's testimony. The following background information is provided:

a. The accused might have prior conviction that could be used to impeach his testimony at trial.

b. The State must give reasonable written pre-trial notice of the State's intent to use prior conviction to impeach. Tenn. R. Evid. 609(a)(3), (1993).

c. On this motion this Court is requested to make a determination before the accused elects to testify that the probative value of the conviction on credibility is greater than its unfair prejudicial effect on the substantive issues. Tenn. R. Evid. 609(a)(3), (1993).

2. The accused further requests this Court to conduct a hearing out of the presence of the jury to determine what, if any,

M18

specific instances of conduct may be used by the State for the purpose of impeaching the accused's testimony. Tenn. R. Evid. 608(b)(1). (1993). The following background information is provided:

a. The State must give the accused written notice of the impeaching conduct before trial. Tenn. R. Evid. 608(b)(3). (1993).

b. On this motion this Court is requested to determine if the conduct's probative value on credibility outweighs its unfair prejudicial effect on the substantive issues. Tenn. R. Evid. 608(b)(3). (1993).

WHEREFORE, the accused respectfully moves this Court to grant the requested relief.

Respectfully submitted,

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing Motion has been delivered to the office of the District Attorney General this the 4 day of March, 19 98.

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

2515B/77-78

IN THE CRIMINAL COURT OF TENNESSEE
THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS

Division Six

FILED
98 MAR 16 AM 9:03
WILLIAM [illegible] CLERK
BY

STATE OF TENNESSEE

vs

INDICTMENT: 98-01033-34

Michael D. Rimmer

RESPONSE OF THE STATE OF TENNESSEE
TO MOTION FOR PRE-TRIAL MORGAN HEARING

In response to the defendant's Motion for Pre-Trial Morgan Hearing the State of Tennessee would submit the following:

1. The defendant is not entitled to an advisory opinion from the Court prior to the defendant actually taking the stand. If the defendant does not take the stand there would be no issue as to what convictions could be used to impeach him.

2. The Supreme Court of this state, in the case of STATE vs. MARTIN, 642 S.W. 2d 720 (1982), specifically said that the defendant was not entitled to a hearing to determine if his priors are admissible to impeach him. Furthermore, in the case of STATE vs. BAKER, 639 S.W.2d 670 (1982), the Court of Criminal Appeals stated that the defendant "is not entitled to an advisory ruling concerning this issue."

WHEREFORE, the State of Tennessee respectfully submits that the defendant's Motion for a Pre-Trial Morgan Hearing should be denied.

Respectfully submitted,

Thomas D. Henderson
Assistant District Attorney General

CERTIFICATE OF SERVICE

This is to certify that a true and exact copy of the foregoing response was caused to be delivered to Public Defender, counsel for the defendant, on February 11, 1998

Thomas D. Henderson
Assistant District Attorney General

IN THE CRIMINAL COURTS FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS
DIVISION VI

FILED
93 MAR -4 PM 12:28
WILLIAM R. KEY, CLERK
BY_____

STATE OF TENNESSEE *
*
Plaintiff *
*
*
VS. * NO(S). 98-01034
*
MICHAEL RIMMER *
*
*
Defendant *

MOTION TO REQUIRE LIST OF STATE'S WITNESSES
IN THE SENTENCING STAGE OF THE TRIAL

Comes now the accused and moves this Honorable Court to require the State to provide a list of witnesses and their addresses that the State intends to call at the sentencing stage of the trial in the instant cause.

The accused would show:

1. The State has a duty to generally list all potential witnesses. Tenn. Code Ann. 40-17-106; Tenn. Rules Crim. Proc. Rule 16; Graves v. State, 489 S.W. 2d 74 (Tenn. Crim. App. 1972); State v. Street, 768 S.W. 2d 703 (Tenn. Crim. App. 1988); State v. West, 825 S.W. 2d 695 (Tenn. Crim. App. 1992).

2. That failure to provide the requested list would prove prejudicial to the accused. U. S. Const. Amends. XIII and XIV; Tenn. Const. Art. I, §§ 8 and 16.

3. Because hearsay evidence may be used during the sentencing stage of a trial, it is essential that an early disclosure of the requested list be granted. Omission of the list would handicap the accused in the preparation of his total defense, and subject him to the surprise testimony of a potentially damaging witness at a critical stage of his case and is therefore, fundamentally unfair. U. S. Const. Amends. XIII and XIV; Tenn. Const. Art. I, §§ 8 and 16.

M19

WHEREFORE, accused prays this Court grant the requested relief.

Respectfully submitted,

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been delivered to the Office of the District Attorney General this the 4 day of March, 1985.

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

2515B/79-80

IN THE CRIMINAL COURT OF TENNESSEE
THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS

Division Six

FILED
98 MAR 16 AM 9
WILLIAM R. KEY, C.
BY

STATE OF TENNESSEE

vs

INDICTMENT: 98-01033-34

Michael D. Rimmer

RESPONSE OF THE STATE OF TENNESSEE TO
DEFENDANT'S MOTION TO REQUIRE LIST OF STATE WITNESSES
IN THE SENTENCING STAGE OF THE TRIAL

The State of Tennessee would respectfully show unto the Court as follows:

1. The State submits there is no authority to grant the request made by counsel for the defendant. T.C.A. Section 40-17-106 provides that the names of witnesses to be called shall be endorsed on the back of the indictment. This statute is being construed to mean only that the witnesses to be called in the State's case in chief shall be listed. Furthermore, the courts of this statute is directory only and not mandatory.

2. The State is aware of no provision of the United States Constitution providing that names of witnesses during the sentencing stage of a capitol case must be provided to counsel for the defense and would request counsel for the defense to cite such authority as he has.

WHEREFORE, the State of Tennessee respectfully submits that the Motion to Require List of State Witnesses in the Sentencing Stage of the Trial should be denied.

Respectfully submitted,

Thomas D. Henderson
Assistant District Attorney General

CERTIFICATE OF SERVICE

This is to certify that a true and exact copy of the foregoing response was caused to be delivered to Public Defender, counsel for the defendant, on February 11, 1998

Thomas D. Henderson
Assistant District Attorney General

IN THE CRIMINAL COURTS FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS
DIVISION VI

FILED
98 MAR -4 PM 12:28
WILLIAM R. KEY, CLERK
BY_____

STATE OF TENNESSEE	*	
Plaintiff	*	
VS.	*	NO(S). 98-01034
MICHAEL RIMMER	*	
Defendant	*	

MOTION TO COMPEL DISCLOSURE OF AGGRAVATING CIRCUMSTANCES

The accused, by counsel respectfully moves this Court pursuant to Rule 12.3(b) of the Tennessee Rules of Criminal Procedure to order the State of Tennessee to disclose any and all aggravating circumstances which they intend to present at the penalty of this bifucated trial. The accused would show that:

1. Statutory aggravating circumstances may be raised by the evidence at the sentencing hearing or guilt hearing. Tenn. Code Ann. §39-13-204(e)(1) (Supp. 1995).

2. The State failed to show these circumstances on the indictment; thereby, failing to, in the interest of justice, place the accused on notice. Such notice is required because the accused must be given "a fair opportunity to rebut any hearsay statements" which may be used at sentencing stage. Tenn. Code Ann. §39-13-204(c), (Supp. 1995).

WHEREFORE, the accused respectfully moves this Court to grant the relief sought in the premises of this motion.

Respectfully submitted,

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

M20

CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing Motion has been delivered to the office of the District Attorney General this the 4 day of March 19 96.

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

2515B/81-82

IN THE CRIMINAL COURTS FOR THE THIRTIETH JUDICIAL
DISTRICT AT MEMPHIS
DIVISION VI

FILED
98 MAR -4 PM 12:28
WILLIAM R. KEY, CLERK
BY

STATE OF TENNESSEE *
*
Plaintiff *
*
*
VS. * NO(S). 98-01034
*
MICHAEL RIMMER *
*
Defendant *

MOTION TO REQUIRE STATE TO FILE WRITTEN
RESPONSE TO PRE-TRIAL MOTIONS

Comes now the accused in the above styled cause and moves this Honorable Court to order the District Attorney as legal representative for the State of Tennessee in this cause to file written response to any and all pre-trial motions filed by the accused. The accused would request that such written response be filed within ten (10) days of the receipt of the copy of any such filed motions.

Respectfully submitted,

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been delivered to the office of the District Attorney General this the 4 day of March, 19 98.

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

M21

2515B/83

IN THE CRIMINAL COURTS FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS
DIVISION VI

FILED
98 MAR -4 PM 12:28
WILLIAM K. KEY, CLERK
BY_____

STATE OF TENNESSEE *
*
Plaintiff *
*
*
VS. * NO(S). 98-01034
*
*
MICHAEL RIMMER *
*
Defendant *

MOTION FOR THE PRODUCTION OF POLICE REPORTS

Comes now the accused, by and through counsel, and moves this Honorable Court to order the Attorney General to produce for in camera inspection by this Honorable Court all police reports involved in this case. The accused also requests that after the inspection of the records, this Honorable Court then release to the accused, through counsel, those items the court deems material to the defense. State v. Butts, 640 S.W. 2d 37 (Tenn. Crim. App. 1982); State v. Kelly, 697 S.W. 2d 355 (Tenn. Crim. App. 1985).

The accused would show that:

1. A prosecutor is required, on request, to give to the defendant any exculpatory information which is material to guilt or innocence. State v. Marshall, 845 S.W. 2d 228 (Tenn. Crim. App. 1992), United States v. Bibby, 752 F. 2d 1116 (1985). See also, Brady v. Maryland, 373 U.S. 83 (1963).

2. Police reports are discoverable prior to trial for defense preparation under Rule 16(a)(1)(A), (B) and (D) to the extent they contain the defendant's pretrial statement, his prior criminal record, or the results of tests related to the investigation in question. State v. Robinson, 618 S.W. 2d 754 (Tenn. Crim. App. 1981).

3. Police reports are not the work product of the Attorney General's Office because the police department is not a part of the

Attorney General's Office. "Material in the possession of the police and not in the possession of the District Attorney General's Office is discoverable because the request is to the State of Tennessee and not only to the files of the prosecuting attorney." State v. Davis, 823 S.W. 2d 217 (Tenn. Crim. App. 1991).

4. Due process imposes upon the prosecution an obligation to disclose favorable evidence. Brady v. Maryland, 373 U.S. 83 (1963). The accused contends the failure to provide police reports to defense counsel violates the accused's Constitutional rights. U.S. Const. Amend. XIV; Tenn. Const. Art. 1, §8.

WHEREFORE, the accused pursuant to the Tennessee Rules of Criminal Procedure and the Tennessee and United States Constitutions respectfully moves this Honorable Court to grant the relief sought in the premises of this motion.

Respectfully submitted,

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been delivered to the Office of the District Attorney General this the 4 day of March, 19 98.

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

2515B/84-85

IN THE CRIMINAL COURT OF TENNESSEE
THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS

Division Six

FILED
98 MAR 16 AM 9:02
WILLIAM K. ... CLERK
BY

STATE OF TENNESSEE

vs

INDICTMENT: 98-01033-34

Michael D. Rimmer

RESPONSE OF THE STATE OF TENNESSEE TO
MOTION FOR PRODUCTION OF POLICE REPORTS

Comes now the State of Tennessee and responds that the defendant is not entitled to the police reports requested, pursuant to Rule 12(2), Tennessee Rules of Criminal Procedure.

The above Rule "does not authorize the discovery or inspection of reports, memoranda, or other internal state documents made by the district attorney general or other state agents or law-enforcement officers in connection with the investigation or prosecution of the case, or of statements made by state witnesses or prospective state witnesses".

WHEREFORE, the State of Tennessee respectfully submits that the defendant's motion should be denied.

Respectfully submitted,

Thomas D. Henderson
Assistant District Attorney General

CERTIFICATE OF SERVICE

This is to certify that a true and exact copy of the foregoing response was caused to be delivered to Public Defender, counsel for the defendant, on February 11, 1998

Thomas D. Henderson
Assistant District Attorney General

IN THE CRIMINAL COURTS FOR THE THIRTIETH JUDICIAL
DISTRICT AT MEMPHIS
DIVISION VI

FILED
98 MAR -4 PM 12:28
WILLIAM R. KEY, CLERK
BY

STATE OF TENNESSEE *
*
Plaintiff *
*
*
VS. * NO(S). 98-01034
*
*
MICHAEL RIMMER *
*
Defendant *

MOTION IN LIMINE - PHOTOGRAPHS OF DECEASED WHILE ALIVE

Comes the defendant, by and through counsel of record, and moves this Court for an order denying the prosecution the right to use, as evidence, certain pictures of the deceased while alive.

As grounds therefore, the defendant states:

1. The probative value of a photograph "upon any material issue is a preliminary question to be determined by trial judge". Strickland Transportation Co. v. Douglas, 264 S.W. 2d 233 (Tenn. App. 1954).

2. The pictures have little or no probative value in that they cannot serve to illustrate any issue which will be before the jury. See, State v. Dicks, 615 S.W. 2d 126 (Tenn.), Cert. denied 454 US 93 (1981).

3. The prejudicial impact of the pictures so outweigh their probative value as to make their use violative of due process, both federal and state. See, State v. Beckham, CCA No. 02C01 - 94606 - CR - 00107 (Tn. Crim. App. July 8, 1996) (application for appeal granted, remanded for sentencing).

WHEREFORE, the defendant respectfully requests that this Court set this motion for a hearing on the merits and at the hearing grant the relief requested.

Respectfully submitted,

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

M23

CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing Motion has been delivered to the office of the District Attorney General this the 4 day of March, 1998.

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

2515B/86-87

IN THE CRIMINAL COURT OF TENNESSEE
THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS

Division Six

FILED
98 MAR 16 AM 9:03
WILLIAM K. KEY, CLERK
BY

STATE OF TENNESSEE

vs

INDICTMENT: 98-01033-34

Michael D. Rimmer

RESPONSE OF THE STATE OF TENNESSEE TO
MOTION IN LIMINE REGARDING PHOTOGRAPHS OF
DECEASED WHILE ALIVE

Comes now the State of Tennessee and responds that a photograph of the defendant's victim while alive is relevant, material and elemental to a charge of Murder in the First Degree.

Two essential elements of murder in the first degree are set forth in T.P.I. - Crim. 20.01:

"that the defendant unlawfully killed the alleged victim;" and

"that the killing was willful; that is, that the defendant...intended to take the life of the alleged victim."

The State further submits that the State has the burden of proving all elements of the offense, including the true identity of the victim as a reasonable creature in being.

WHEREFORE, the State of Tennessee respectfully requests that the defendant's aforementioned motion be denied.

Respectfully submitted,

Thomas D. Henderson
Asst. District Attorney General

CERTIFICATE OF SERVICE

This is to certify that a true and exact copy of the foregoing response was caused to be delivered to Public Defender, counsel for the defendant, on February 11, 1998

Thomas D. Henderson
Assistant District Attorney General

IN THE CRIMINAL COURTS FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS
DIVISION VI

FILED
98 MAR -4 PM 12:29
WILLIAM R. KEY, CLERK
BY _____

STATE OF TENNESSEE *
*
Plaintiff *
*
*
*
VS. * NO(S). 98-01034
*
MICHAEL RIMMER *
*
Defendant *

MOTION TO DISMISS ON THE GROUNDS THAT ELECTROCUTION CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT

Comes now the accused and respectfully moves this Honorable Court for an Order striking down electrocution as an unconstitutional method of inflicting the death penalty. Electrocution is now known to cause extreme physically cruel punishment.

In light of modern technology, the use of electrocution is cruel and unusual punishment and therefore is a violation of Article 1, Section 13 and 16 of the Tennessee Constitution and the Eighth and Fourteenth Amendments to the Federal Constitution.

Respectfully submitted,

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Motion has been delivered to the office of the District Attorney General this the 4 day of March, 19 98.

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

M24

2515B/88

IN THE CRIMINAL COURTS FOR THE THIRTIETH JUDICIAL
DISTRICT AT MEMPHIS
DIVISION VI

FILED
98 MAR -4 PM 12:29
WILLIAM R. KEY, CLERK
BY

STATE OF TENNESSEE *
*
Plaintiff *
*
*
VS. * NO(S). 98-01034
*
*
MICHAEL RIMMER *
*
Accused

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS THE DEATH PENALTY ON GROUNDS THAT ELECTROCUTION CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT

If the State of Tennessee wished to torture the accused and kill him by degrees in a slow and lingering death, this Court would not hesitate to find such a punishment cruel and unusual in patent violation of Article 1, Section 16 of the Tennessee Constitution and Amendments 8 and 14 of the Federal Constitution.

For that reason the death penalty must be struck down in the present case as it involves immeasurable torture to the mind of a man about to be executed and a slow and painful death which no human would wish upon another.

I. DEATH BY ELECTROCUTION WOULD BE PHYSICALLY CRUEL TO THE ACCUSED.

When death by electrocution was first invented and approved in the State of New York in 1888, the Supreme Court upheld its constitutionality in large measure because electrocution was, wrongly, understood to produce "instantaneous, and therefore, painless, death." In Re Kemmler, 136 U. S. 436, 447 (1980).

1] George Westinghouse, founder of Westinghouse Electric Company, "thought that the job could have been 'done better with an axe.'" Voices Against Death xxxii (P. Mackey ed. 1976). The New York Press asserted that "the age of burning at the stake is past; the age of burning at the wire will pass also." Beichman, The First Electrocution, 35 Commentary 410, 411 (1963).

One hundred years of electrocutions in this country have clearly demonstrated that death is neither instantaneous nor painless.

Death by electrical current is extremely violent and goes well beyond merely extinguishing life.

When the switch is thrown, the condemned man "cringes," "leaps," and "fights the straps with amazing strength." Hearings on S. 1760 before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 90th Cong., 2d. Sess., 20 (hereinafter 1968 hearings) (statement of Clinton Duffy, former warden of San Quentin).

The hands of the condemned turn red, then white, and the cords of the neck stand out like steel bands. Lawes, Life and Death in Sing Sing at 170 (1928).

The force of the electricity is so great the prisoner's eyeballs pop out and rest upon his cheeks.

The dying man defecates, urinates and vomits blood and drool. (1968 hearings at 20).

As the electrical current passes through the body, its temperature rises and the body turns bright red. The prisoner's flesh swells and his skin stretches to the point of breaking.

On some occasions, the prisoner's body actually catches on fire, particularly if he sweats profusely. Rubin, The Supreme Court and the Death Penalty, 15 Crime and Delinquency 128, 129 (1969).

The executioner hears a loud and sustained sound "like bacon frying" and "the sickly sweet smell of burning flesh" engulfs the death chamber.

The smell of an electrical death is so bad, it has been known to nauseate even representatives of the press who witness repeated executions ("only the greenhorns sit in the first row. We sit behind. The smell is too bad.") Tyler, Electrocution as a Spectator Sport, 2 Fact 47, 50 N. 19 (1965).

In the meantime the prisoner almost literally boils. The temperature in his brain approaches the boiling point of water and

the body becomes so hot that, at the post electrocution autopsy, the doctors cannot touch the liver. Lawes at 189.

A number of distinguished scientists and medical doctors have argued that the available evidence strongly suggests that electrocution causes unspeakable pain and suffering. In the words of L. G. Rota:

> "In every case of electrocution.... death inevitably supervenes but it may be very long, and above all excruciatingly painful.... the space of time before death supervenes varies according to the subject. Some have a greater physiological resistance than others. I do not believe that anyone killed by electrocution dies instantly, no matter how weak the subject may be... thus, in particular cases, the condemned person may be alive and even conscious for several minutes without it being possible for a doctor to say whether the victim is dead or not... this method of execution is a form of torture."

Duff, A Handbook on Hanging, 118-119 (1974) (hereinafter Duff).

The distinguished United States Supreme Court Justice, William Brennan, has expressed the belief that, in light of modern technology and changes in the law, the legal foundation for electrocution, Kemmler, is now antiquated authority. Glass v. Louisiana, 471 U.S. 1080, 1083 (1985). The Supreme Court has emphasized that the Eighth Amendment forbids "inhuman and barbarous" methods of execution that go at all beyond "the mere extinguishment of life" and cause "torture or a lingering death." Kemmler at 447. "It is beyond debate that the Amendment proscribes all forms of "unnecessary cruelty" that cause gratuitous "terror, pain or disgrace." Wilkerson v. Utah, 99 U.S. 130, 135-136, (quoted in Glass at 1084).

Most courts have refused to analyze the mode of inflicting death by electrocution and have simply cited Kemmler as proof of instantaneous death without pain. But Kemmler was decided in 1890, 98 years ago. Technology has advanced tremendously since that time. We have ceased using horse and buggy for every day transportation and now use sophisticated automobiles and airplanes. It would have been disastrous if we had not tested and improved on technology used in 1890. Yet this is exactly what has been done

regarding the electric chair. While it is true that legislatures are to be given considerable deference in choosing forms of punishment, Justice Brennan cites Gregg, Coker and Furman, for the view that the courts have ultimate authority on the constitutionality of particular modes of execution:

> "...it is evident that legislative judgments alone cannot be determinative of Eighth Amendment standards since that Amendment was intended to safeguard individuals from the abuse of legislative power." Gregg v. Georgia, 482 U.S. 153, 174. "The Constitution contemplates that in the end [a court's] own judgment will be brought to bear on the question of the acceptability "of a challenged punishment, guided by" objective factors to the maximum possible extent." Coker v. Georgia, 433 U.S. 584, 592 (1977). Thus it is firmly within the "historic process of constitutional adjudication" for courts to consider, through a "discriminating evaluation" of all available evidence, whether a particular means of carrying out the death penalty is "barbaric" and unnecessary in light of currently available alternatives. (Furman, 408 U.S. 238, 420. (quoted in Glass at 1083-1084.)

Justice Brennan states that because contemporary courts summarily rejected challenges to electrocution,

> "the evidence respecting this method of killing people has not been tested through the adversarial truth-finding process. There is considerable empirical evidence and eyewitness testimony, however, which if correct would appear to demonstrate that electrocution violates every one of the principles [encompassed by the Eighth Amendment]...This evidence suggests that death by electrocution is extremely violent and inflicts pain and indignities far beyond the 'mere extinguishment of life'".

Id. at 1086. Therefore, it is up to the courts to analyze the evidence, in light of the advances made in technology over 98 years, and determine whether electrocution is now actually in violation of the Eighth Amendment.

II. DEATH BY INSTALLMENTS.

Eyewitness accounts of "modern" executions make it altogether clear that death is not instantaneous.

In 1983 an execution which took place in Alabama, required fourteen minutes before the condemned man was successfully killed.

In the words of an eyewitness:

> At 8:30 p.m. the first jolt of 1900 volts of electricity passed through Mr. Evans' body. It

> lasted thirty seconds. Sparks and flames erupted from the electrode tied to Mr. Evans' left leg. His body slammed against the straps holding him in the electric chair and his fist clenched permanently. The electrode apparently burst from the strap holding it in place. A large puff of grayish smoke and sparks poured out from under the hood that covered Mr. Evans' face. An overpowering stench of burnt flesh and clothing began pervading the witness room. Two doctors examined Mr. Evans and declared that he was not dead.
>
> The electrode on the left leg was refastened. At 8:30 p.m. [sic] Mr. Evans was administered a second 30 second jolt of electricity. The stench of burning flesh was nauseating. More smoke emanated from his leg and head. Again the doctors examined Mr. Evans. The doctors reported that his heart was still beating, and that he was still alive...
>
> At 8:40 p.m., a third charge of electricity, thirty seconds in duration, was passed through Mr. Evans' body. At 8:44 p.m. the doctors pronounced him dead. The execution of John Evans took fourteen minutes.

Affidavit of Russel F. Canan, June 22, 1983, reported in Glass at 1091-1092.

In an execution staged in Georgia on December 12, 1984, the completion of an execution by electrocution was similarly prolonged. In the words of an observer:

> The first charge of electricity administered... to Alpha Otis Stephens in Georgia's electric chair failed to kill him, and he struggled to breathe for eight minutes before a second charge carried out his death sentence for murdering a man who interrupted a burglary... A few seconds after a mask was placed over his head, the first charge was applied, causing his body to snap forward and his fists to clench.
>
> His body slumped when the current stopped two minutes later, but shortly afterward witnesses saw him struggle to breathe. In the six minutes allowed for the body to cool before doctors could examine it, Mr. Stephens took about 23 breaths.
>
> At 12:26 a.m. two doctors examined him and said he was alive. A second two minute charge was administered at 12:28 a.m.

Id. at 1092.

In the words of a Georgia prison official, the condemned man was "just not a conductor of electricity." Id.

These cases are by no means unusual. On the contrary, they are commonplace and are permitted to exist simply because the public as

a whole is shielded from the grisly physical details of death by electrocution. As a result some states have begun to adopt swifter and more humane methods of inducing death. Lethal gas or fast acting barbiturates appear to accomplish the extinction of life and assure a swifter, less violent and more humane death. One of the architects of these alternatives has emphasized that it resulted precisely from the recognition that the electric chair is "a barbaric torture device" and electrocution "a gruesome ritual." Gardner, 39 Ohio State L. J. 96, 1t 126-127 (1978).

III. THE PROSPECT OF DEATH BY ELECTROCUTION CAUSES MENTAL TORTURE.

Even the prospect of death by electrocution exacts its toll on the mental and physical balance of the condemned person. This anguish is nothing short of torture at the prospect of such a physically painful and repellant death.

In the words of one individual who observed the process firsthand:

> For over two years, Henry Arsenault 'lived on death row feeling as if the Court's sentence were slowly being carried out.' Arsenault could not stop thinking about death. Despite several stays, he never believed he could escape execution. 'There was a day to day choking, tremulous fear that quickly became suffocating.' If he slept at all, fear of death snapped him awake sweating. His throat was clenched so tight he often could not eat. His belly cramped, and he could not move his bowels. He urinated uncontrollably. He could not keep still. And all the while a guard watched him, so he would not commit suicide. The guard was there when he had his nightmares and there when he wet his pants. Arsenault retained neither privacy nor dignity. Apart from the guards he was alone much of the time as the day of his execution neared.
>
> 'And on the day of the execution, after three sleepless weeks and five days' inability to eat, after a night's pacing the cell, he heard the warden explain the policy of the Commonwealth - no visitors, no special last meal, and no medication. Arsenault asked the warden to let him walk to the execution on his own. The time came. He walked to the death chamber and turned toward the chair. Stopping him, the warden explained that execution would not be for over an hour. Arsenault sat on the other side of the room as the witnesses filed in behind the one-way mirror. When the executioner tested the chair, the lights dimmed... Arsenault heard the door slam shut

> and the noise echoing, the clock ticking. He wet his pants. Less than half an hour before the execution, the Lieutenant Governor commuted his sentence. Arsenault's legs would not hold him up. Guards carried him back to his cell. He was trembling uncontrollably. A doctor sedated him. And he was moved off death row.
>
> ...The raw terror and unabating stress that Henry Arsenault experienced was torture; torture in the guise of civilized business in an advanced and humane polity. This torture was not unigue, but merely one degrading instance in a legacy of degradation. The ordeals of the condemned are inherent and inevitable in any system that informs the condemned person of his sentence and provides for a gap between sentence and execution. Whatever one believes about the cruelty of the death penalty itself, this violence done the prisoner's mind must afflict the conscience of enlightened government and give the civilized heart no rest.

State v. Dicks, 615 S.W. 2d 126, 137 (Tenn. 1981).

This too is part of the process of death by electrocution which the State of Tennessee seeks to impose upon the accused.

IV. CONCLUSION.

Death by electrocution in the State of Tennessee involves physical and mental torture and a long, lingering, painful death.

Although some overzealous proponents of the death penalty might take gleeful delight in such a prospect, no thoughtful proponent of the death penalty wishes to impose such suffering upon another fellow being.

On the contrary, most proponents of the death penalty are eager to reassure society that the death of a condemned man is painless and represents little or more than "the mere extinguishment of life." Kemmler, at 447.

The Eighth Amendment and Article I, Section 16 require, as much as humanly possible, a method of execution which minimizes the risk of unnecessary pain, violence and mutilation. Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion); see also Estelle v. Gamble, 429 U.S. 97, 102 (1976); see e.g. Wilkerson v. Utah, 99 U.S. 130, 135-136 (1878).

Death by electrocution in the State of Tennessee, as elsewhere, is continually being declared constitutional based on out-dated technological findings from 1890. Modern technology indicates that

death by electrocution is painful and far from instantaneous. For that reason alone, this chosen means of execution offends both the State and Federal Constitutions, and should be struck down accordingly. Eighth and Fourteenth Amendments to the United States Constitution, Article I, Sections 13 and 16 of the Tennessee Constitution.

Respectfully submitted,

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

CERTIFICATE OF SERVICE

I certify that I have forwarded a copy of the foregoing Memorandum to the Office of the District Attorney General this the 4 day of March, 1998.

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

2515B/89-96

IN THE CRIMINAL COURT OF TENNESSEE
THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS

Division Six

FILED
98 MAR 15 AM 9:02
WILLIAM K. REY, CLERK
BY

STATE OF TENNESSEE

vs

INDICTMENT: 98-01033-34

Michael D. Rimmer

RESPONSE OF THE STATE OF TENNESSEE TO
MOTION TO DISMISS ON GROUNDS THAT ELECTROCUTION
CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT

Comes now the State of Tennessee and in response to the defendant's above styled motion to dismiss submits the following:

1. The Tennessee Supreme Court has declared that imposition of the death penalty, as contemplated in T.C.A. §39-2-203 et seq., is not cruel and unusual punishment in violation of Article 1, Sections 13 and 16, of the Tennessee Constitution, and the Eighth and Fourteenth Amendments of the United States Constitution, State vs. Dicks, 615 S.W.2d 126 (Tenn. 1981).

2. The defendant cites no authority in support of his allegation.

WHEREFORE, the State of Tennessee moves that the defendant's motion to dismiss be denied.

Respectfully submitted,

Thomas D. Henderson
Assistant District Attorney General

CERTIFICATE OF SERVICE

This is to certify that a true and exact copy of the foregoing motion was caused to be delivered to Public Defender, counsel for the defendant, on February 11, 1998

Thomas D. Henderson
Assistant District Attorney General

IN THE CRIMINAL COURTS FOR THE THIRTIETH JUDICIAL
DISTRICT AT MEMPHIS
DIVISION VI

FILED
98 MAR -4 PM 12:29
WILLIAM R. KEY, CLERK
BY _____

STATE OF TENNESSEE *
*
Plaintiff *
*
*
VS. * NO(S). 98-01034
*
MICHAEL RIMMER *
*
Defendant *

MOTION TO SUPPRESS STATEMENTS

Comes now the accused and moves the Court to suppress all statements allegedly given by him to any and all law enforcement authorities in that said statements were obtained in violation of accused's constitutional rights, the accused not having knowingly, voluntarily, and intelligently waived those rights prior to making the statements. Further, the officers failed to follow the mandate of Miranda v. Arizona, 384 U.S. 436 (1966), and accused was arrested and detained without probable cause.

Respectfully submitted,

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

CERTIFICATE OF SERVICE

I certify that I have delivered a copy of the foregoing Motion to the office of the District Attorney General this the 4 day of March, 1998.

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

M26

2515B/97

IN THE CRIMINAL COURT OF TENNESSEE
THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS

Division Six

FILED
98 MAR 16 AM 9:03
WILLIAM K. KEY, CLERK
BY

STATE OF TENNESSEE

vs

INDICTMENT: 98-01033-34

Michael D. Rimmer

RESPONSE OF THE STATE OF TENNESSEE
TO MOTION TO SUPPRESS DEFENDANT'S STATEMENT

In response to the defendant's Motion to Suppress Statement, the State would respectfully submit as follows:

1. The State denies that the statement or statements taken from the defendant were the result of any illegality.

2. The State submits that any statements taken from the defendant were taken in accordance with the laws of the State of Tennessee and of the United States.

3. The State would demand strict proof of all factual allegations contained in the defense motion.

Respectfully submitted,

Thomas D. Henderson
Assistant District Attorney General

CERTIFICATE OF SERVICE

This is to certify that a true and exact copy of the foregoing response was caused to be delivered to Public Defender, counsel for the defendant, on February 11, 1998

Thomas D. Henderson
Assistant District Attorney General

IN THE CRIMINAL COURTS FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS
DIVISION VI

FILED
98 MAR -4 PM 12:29
WILLIAM R. KEY, CLERK
BY _____

STATE OF TENNESSEE *
*
Plaintiff *
*
*
VS. * NO(S). 98-01034
MICHAEL RIMMER *
*
*
Defendant *

MOTION TO SUPPRESS EVIDENCE

Comes now the accused and moves the Court to suppress all evidence sought to be used against him at trial of this cause, on the grounds that such evidence was illegally seized in violation of the defendant's rights as protected under the Fourth and Fourteenth Amendments of the United States Constitution and the Constitution of the State of Tennessee.

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

CERTIFICATE OF SERVICE

I certify that I have delivered a copy of the foregoing Motion to the office of the District Attorney General this the 4 day of March, 19 98.

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

M27

2515B/98

IN THE CRIMINAL COURTS FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS
DIVISION VI

FILED
98 MAR -4 PM 12:29
WILLIAM N. KEY, CLERK
BY

STATE OF TENNESSEE *
*
Plaintiff *
*
*
VS. * NO(S). 98-01034
*
MICHAEL RIMMER *
*
Defendant *

MOTION TO INSPECT GRAND JURY, OR IN THE ALTERNATIVE, MOTION TO DISMISS

Comes now the Accused pursuant to Rules 6(e)(7) and (k)(2) of the Tennessee Rules of Criminal Procedure, by and through undersigned counsel and respectfully moves this Honorable Court for an Order permitting him to inspect the minutes of the Grand Jury, which returned the indictment against him and to have the Grand Jury members disclose testimony of witnesses examined before them for purposes of ascertaining whether it is consistent with that given by the witnesses before the Court.

Further, the Accused moves the Court to Dismiss should it be found that the Shelby County Grand Jury has failed to keep minutes.

Respectfully submitted,

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

CERTIFICATE OF SERVICE

I certify that I have furnished a copy of the foregoing Motion to the office of the District Attorney General this the 4 day of March, 19 98.

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

M28

2515B/99

IN THE CRIMINAL COURT OF TENNESSEE
THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS

Division Six

STATE OF TENNESSEE

vs

INDICTMENT: 98-01033-34

Michael D. Rimmer

RESPONSE TO MOTION TO INSPECT GRAND JURY MINUTES
OR IN THE ALTERNATIVE
MOTION TO DISMISS

Comes now the State of Tennessee, by and through the undersigned Assistant District Attorney General, and for answer to the Motion to Inspect Grand Jury Minutes, or in the Alternative, Motion to Dismiss, would respectfully show unto the Court as follows:

I.

There is no authority cited which would require that the Grand Jury keep minutes.

II.

There is no factual basis for the request to inspect such minutes, if such do exist.

III.

There is no basis upon which to request that the members of the Grand Jury disclose the testimony of any witness before it. The common practice in this jurisdiction is for one police officer to present the case to the Grand Jury. Unless and until that officer testifies to something which the defense, in good faith, believes to be inconsistent with such officer's testimony before the Grand Jury, there is no need to require the Grand Jury to disclose such testimony. Additionally, the Grand Jury does not routinely record or transcribe testimony before it and, accordingly, only the memories of all members of said Grand Jury would be available.

IV.

To allow the defense to routinely depose all members of a Grand Jury in the hope that some inconsistency might develop at trial would effectively destroy the secrecy of Grand Jury proceedings.

Wherefore, the State respectfully requests that the Court deny the Motion to Inspect Grand Jury Minutes, or in the Alternative Motion to Dismiss.

Respectfully submitted,

Thomas D. Henderson
Assistant District Attorney General

CERTIFICATE OF SERVICE

This is to certify that a true and exact copy of the foregoing response was caused to be delivered to Public Defender, counsel for the defendant, on February 11, 1998

Thomas D. Henderson
Assistant District Attorney General

IN THE CRIMINAL COURTS FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS
DIVISION VI

FILED
98 MAR -4 PM 12:29
WILLIAM R. KEY, CLERK
BY

STATE OF TENNESSEE *
*
Plaintiff *
*
*
VS. * NO(S). 98-01034
*
MICHAEL RIMMER *
*
Defendant *

MOTION FOR BILL OF PARTICULARS

Comes now the Accused, through his attorney, and respectfully moves the Court to direct the filing of a Bill of Particulars as provided in Rule 7(c) of the Tennessee Rules of Criminal Procedure so as to adequately identify the offense charged.

WHEREFORE, THE ACCUSED PRAYS that the Attorney General be directed to file a Bill of Particulars to give the defendant notice of the exact charges against him.

Respectfully submitted,

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

CERTIFICATE OF SERVICE

I certify that I have delivered a copy of the foregoing Motion to the office of the District Attorney General this the 4 day of March, 19 98.

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

M29

2515B/100

IN THE CRIMINAL COURT OF TENNESSEE
THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS

Division Six

FILED
98 MAR 16 AM 9:02
WILLIAM [illegible] CLERK
BY

STATE OF TENNESSEE

vs

INDICTMENT: 98-01033-34

Michael D. Rimmer

RESPONSE OF THE STATE OF TENNESSEE TO
MOTION FOR BILL OF PARTICULARS

In response to the Motion for Bill of Particulars filed by defendant, the State of Tennessee respectfully submits the following:

1. Indictment No. 98-01033-34 is clear on its face and sufficiently apprises the defendant of the charge against him.

2. A Bill of Particulars is not intended under the Rules of Criminal Procedure to be a substitute for discovery before trial. The Commission comments to Rule 7 of the Tennessee Rules of Criminal Procedure state:

> Subsection (c) provides for a bill of particulars where needed by the defendant in order that the defendant can know precisely what he is charged with. This provision is to be construed to serve that singular purpose, and is not meant to be used for purposes of broad discovery.

THEREFORE, the State of Tennessee requests that defendant's Motion for Bill of Particulars be denied.

Respectfully submitted,

Thomas D. Henderson
Assistant District Attorney General

CERTIFICATE OF SERVICE

This is to certify that a true and exact copy of the foregoing response was caused to be delivered to Public Defender, counsel for the defendant, on February 11, 1998

Thomas D. Henderson
Assistant District Attorney General

IN THE CRIMINAL COURTS FOR THE THIRTIETH JUDICIAL
DISTRICT AT MEMPHIS
DIVISION VI

FILED
98 MAR -4 PM 12:29
WILLIAM R. KEY, CLERK
BY _____

STATE OF TENNESSEE *
*
Plaintiff *
*
*
VS. * NO(S). 98-01034
*
MICHAEL RIMMER *
*
Defendant *

MOTION TO DISMISS

Comes now the defendant in the above styled case and moves this Honorable Court to dismiss the indictment on the grounds that T.C.A. 39-13-204 et seq., which allows for the imposition of the death penalty upon conviction of Murder in the First Degree violates the 5th, 6th, 8th and 14th Amendments to the United States Constitution on it's face and as applied in that it fails to provide for a meaningful proportionality review of the death sentence.

Respectfully submitted,

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing Motion has been served upon the Shelby County District Attorney General by hand delivering a copy of the Motion this 4 day of March, 19 98.

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

M30

2515B/101

IN THE CRIMINAL COURT OF TENNESSEE
THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS

Division Six

FILED
98 MAR 16 AM 9:03
WILLIAM K. KEY, CLERK
BY

STATE OF TENNESSEE

vs

INDICTMENT: 98-01033-34

Michael D. Rimmer

RESPONSE OF THE STATE OF TENNESSEE TO
DEFENDANT'S PAPER WRITING STYLED "MOTION TO DISMISS"

In response to the above styled Motion to Dismiss filed by the defendant, the State denies that Chapter 51, Public Acts of 1977, as codified, is violative of either the United States or Tennessee Constitution, and would submit the following:

1. Tenn.R. Crim.P. 12.3 requires the State to give notice of aggravating circumstances; accordingly, no rights of the defendant are violated.

2. The procedure provided by the Act, namely a bifurcated trial with the first stage being a determination of the guilt or innocence of the charged offense charged and the second stage being a finding of whether aggravating circumstances exist regarding the crime and whether those are outweighed by any mitigating circumstances, has been approved in Jurek vs. Texas, 96 S.Ct. 2950 (1976), State vs. Austin, 618 S.W. 2d 738 (Tenn. 1981), and State vs. Houston, 593 S.W. 2d 267 (Tenn. 1980), and in no way violates the double jeopardy prohibitions of the Constitution.

3. The language of the statute allowing hearsay evidence during the sentencing stage does not violate either the United States or Tennessee Constitution, with regard to the introduction of hearsay testimony, for it provides that "the defendant is accorded a fair opportunity to rebut any hearsay statements so admitted." See Austin and Houston, supra. As a further protection, evidence obtained in violation of either Constitution is not admissible.

4. The sentencing system provided by the Act is not so vague, as argued by the defendant, that it results in the arbitrary and capricious imposition of the death penalty. Rather, the Act follows holdings of the Supreme Court in decisions regarding death penalty statutes. See Gregg vs. Georgia, 96 S.Ct. 2950 (1976), Austin, supra, and Houston, supra. As a further protection to an accused, the Tennessee Supreme Court, approved in Gregg vs. Georgia, supra, requiring that detailed

information regarding the defendant, the crime, the jury, the defense attorney, the trial and the background of the case be supplied to the Court.

5. T.C.A. Section 39-2-206 deals with the punishment of accessories before the fact to murder in the first degree. Under prior law, an accessory before the fact who was tried after the principal could receive the death penalty, but if he were tried before the principal the most he could receive was life imprisonment. In order to avoid constitutional attacks on the death penalty statute on this ground, the penalty that may be imposed on an accessory before the fact to murder in the first degree no longer, under this section, depends on when the principal's trial occurs or the penalty imposed on the principal.

6. The defense alleges that this Act provided that the death penalty may be imposed for murders that are not "deliberate in fact." T.C.A. Section 39-2-203 clearly requires that the homicide in question be deliberated or be committed in perpetration of an enumerated felony before the death penalty may be imposed, thus full meeting the constitutional requirements set forth in Gregg vs. Georgia, supra.

7. The infliction of death as punishment for certain criminal offenses is not cruel and unusual punishment and has been approved in the cases cited throughout this response.

8. The conclusionary allegations that the comparative analysis by the Supreme Court of capital cases is unenforceable fails to raise any constitutional issue.

9. The burden of proof is upon the State to prove aggravating circumstances. The defense has no more burden of proof during the sentencing stage than it does during the guilt or innocence phase after the State rests. The defense motion alleges no specific constitution violation in this regard.

10. The statute does not foreclose the possibility of mercy on the part of the jury. In fact, mercy is inherent in the entire scheme of the statute requiring and allowing the State to prove only certain well-defined aggravating circumstances while allowing the defense to prove any mitigating circumstance listed, or any other factor which would be mitigating.

11. The phrase, "The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind." is not unconstitutionally vague. See Decks, supra.

12. The Tennessee Supreme Court has already considered the constitutionality of the death penalty statute in a multitude of cases and upheld the statute against a comprehensive attack on grounds similar to those in the subject motion.

WHEREFORE, the State of Tennessee respectfully submits that the referenced Motion to Dismiss should be denied.

Respectfully submitted,

Thomas D. Henderson
Assistant District Attorney General

CERTIFICATE OF SERVICE

This is to certify that a true and exact copy of the foregoing response was caused to be delivered to Public Defender, counsel for the defendant, on February 11, 1998

Thomas D. Henderson
Assistant District Attorney General

IN THE CRIMINAL COURTS FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS
DIVISION VI

FILED
98 MAR -4 PM 12:29
WILLIAM R. KEY, CLERK
BY _____

STATE OF TENNESSEE *
*
Plaintiff *
*
*
VS. * NO(S). 98-01034
*
MICHAEL RIMMER *
*
Defendant *

MOTION FOR FUNDS FOR PROPORTIONALITY STUDY

Comes now the accused, who is indigent, in the above styled case and moves this Honorable Court to provide funds for an expert to conduct a study of the sentences imposed in first degree murder cases in the State of Tennessee. The accused would show that the imposition of the death penalty in this case would be a disproportionate sentence when compared to other sentences for first degree murder in the State of Tennessee.

Respectfully submitted,

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing Motion has been served upon the Shelby County District Attorney General by hand delivering a copy of the Motion this 4 day of March, 19 98.

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

M31

2515B/102

IN THE CRIMINAL COURT OF TENNESSEE
THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS

Division Six

STATE OF TENNESSEE

vs INDICTMENT: 98-01033-34

Michael D. Rimmer

STATE'S RESPONSE TO DEFENDANT'S MOTION FOR FUNDS FOR PROPORTIONALITY STUDY

Comes now the State of Tennessee, by and through the undersigned Assistant District Attorney General, and for answer to the Motion for Funds for Proportionality Study, would respectfully show unto the Court as follows:

1. The defendant does not provide sufficient facts or authority that would enable the State to respond to said Motion.

2. The "Proportionality Study" is premature, since the defendant has not been convicted of Murder in the First Degree, to warrant a study which would pertain to the sentencing stage of the trial.

Wherefore, the State respectfully requests that the Court deny the Motion to Video Tape Trial.

Respectfully submitted,

Thomas D. Henderson
Assistant District Attorney General

CERTIFICATE OF SERVICE

This is to certify that a true and exact copy of the foregoing response was caused to be delivered to Public Defender, counsel for the defendant, on March 9, 1998.

Thomas D. Henderson

IN THE CRIMINAL COURTS FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS
DIVISION VI

FILED
98 MAR -4 PM 12:29
WILLIAM K. KEY, CLERK
BY_____

STATE OF TENNESSEE
Plaintiff

VS.

MICHAEL RIMMER
Accused

NO(S). 98-01034

MOTION FOR COURT TO INSTRUCT THE JURY, DURING THE PENALTY PHASE OF THE TRIAL, THAT IT MAY CONSIDER SYMPATHY, BASED UPON THE EVIDENCE PRESENTED, IN REACHING ITS VERDICT

Comes now the accused, through his attorney, and would move to have the Court allow an instruction to the jury, during the penalty phase of the trial, that it may consider sympathy, based upon the evidence presented, in reaching its verdict, because:

1. The United States Supreme Court has repeatedly stated that a high degree of scrutiny of the capital sentencing determination is required to ensure that the capital sentencing decision does not violate the Eighth Amendment prohibition against cruel and unusual punishment.
2. The United States Supreme Court in two different decisions has stated the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.
3. At the penalty phase, the jury decides a question based not only on the facts, but also on the jury's moral assessment of those facts as they reflect on whether a defendant should be put to death. Therefore it is not only appropriate, but necessary that the jury weigh

sympathetic elements of a defendant's background against those that may offend the conscience.

4. Under Tennessee Pattern Jury Instructions, T.P.I.-Crim. 20.03 at page 218, the jury is admonished from considering any sympathy or prejudice in making their decision. Thus, in violation of federal constitutional law, Tennessee juries are admonished at the outset not to let sympathy enter as a factor during their deliberations.

5. T.C.A. 39-2-202(b) provides that a person convicted of murder in the first degree shall be punished by death or by imprisonment for life. In arriving at this determination, Tennessee juries are instructed that they are authorized to weigh and consider any mitigating circumstances and any of the statutory aggravating circumstances which may have been raised by the evidence throughout the entire course of the trial, including the guilt finding phase or the sentencing phase or both.

6. There is an ambiguity between the Tennessee Pattern Jury Instructions and T.C.A. 39-2-202(b) which gives rise to increased confusion, ambiguity, and a lack of adequate guidance to a sentencing body considering the imposition of the ultimate punishment.

Based on the above stated grounds, the defendant moves that the Court allow an instruction to the jury, during the penalty phase of the trial, that it may consider sympathy, based upon the evidence presented, in reaching its verdict.

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

CERTIFICATE OF SERVICE

I certify that I have delivered a copy of the foregoing Motion to the office of the District Attorney General this the 4 day of March, 19 98.

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

2515B/103-104

IN THE CRIMINAL COURTS FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS
DIVISION VI

FILED
98 MAR -4 PM 12:29
WILLIAM R. KEY, CLERK
BY_____

STATE OF TENNESSEE
Plaintiff

VS.

MICHAEL RIMMER
Accused

NO(S). 98-01034

MEMORANDUM IN SUPPORT OF MOTION FOR COURT TO INSTRUCT THE JURY, DURING THE PENALTY PHASE OF THE TRIAL, THAT IT MAY CONSIDER SYMPATHY, BASED UPON THE EVIDENCE PRESENTED, IN REACHING ITS VERDICT

The accused has moved this Honorable Court, in the event of a conviction at the guilt innocence stage of his trial, to instruct the jury during the penalty phase of the trial, that it may consider sympathy, based upon the evidence presented, in determining whether he is sentenced to imprisonment for life, or death by electrocution. In support of his motion, the accused would submit the following:

The United States Supreme Court has repeatedly stated that a high degree of scrutiny of the capital sentencing determination is required to ensure that the capital sentencing decision does not violate the Eighth Amendment prohibition against cruel and unusual punishment. See, e.g., California v. Ramos, 463 U.S. 992, 998 99 (1983). In Woodson v. North Carolina, 428 U.S. 280 (1976), the Court declared that "the penalty of death is qualitatively different from a sentence of imprisonment, however long". Thus, because of its severity and irreversibility, the death penalty is the ultimate restraint. As such, this qualitative difference from other punishments reguires "a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case". Woodson, at 305. Therefore, "[t]he

M33

nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence". Lockett v. Ohio, 438 U.S. 586, 605 (1978).

The United States Supreme Court's decision in Lockett v. Ohio, supra, and Eddings v. Oklahoma, 455 U.S. 104 (1982), "make it clear that in a capital case the defendant is constitutionally entitled to have the sentencing body consider any 'sympathy factor' raised by the evidence before it". The Lockett Court concluded that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death". Lockett v. Ohio, 438 U.S. 586, 604 (1978).

In Gregg v. Georgia, 428 U.S. 153 (1976), the Court upheld the Georgia sentencing scheme which allowed jurors to consider mercy in deciding whether to impose the penalty of death. Id., at 203. The Court stated that "[n]othing in any of our cases suggests that the decision to afford an individual defendant mercy violates the constitution". Id., at 199.

Thus, federal constitutional law forbids an instruction which denies a capital defendant the right to have the jury consider any "sympathy factor" raised by the evidence when determining the appropriate penalty.

In People v. Easley, 671 P. 2d 813 (Cal. 1983), the Supreme Court of California reversed a judgment, as to penalty, entered on a jury verdict imposing the death penalty in a first degree murder conviction. The judgment was reversed because of a jury instruction not to consider sympathy. The Easley Court held that "by advising the jury at the outset of the instructions that it was not to be influenced by sympathy or pity, the [trial] court significantly misled the jury with respect to the fundamental nature of its sentencing task". Id., at 827. "[Furthermore], at the penalty phase, the jury decides a question the resolution of which turns not

only on the tacts, but on the jury's moral assessment of those facts as they reflect on whether [a] defendant should be put to death. [Therefore], [i]t is not only appropriate, but necessary, that the jury weigh the sympathetic elements of [a] defendant's background against those that may offend the conscience". People v. Easley, at 827, quoting People v. Haskett, 640 P. 2d 776 (1982).

In People v. Lanphear, 680 P. 2d 1081 (Cal. 1984), the Supreme Court of California, again, reversed a death penalty sentence because of a jury instruction not to consider sympathy. The Lanphear Court stated that:

> Sympathy is not itself a mitigating 'factor' or 'circumstance', but an emotion. Recognition that a jury's exercise of sentencing discretion in a capital case may be influenced by a sympathetic response to mitigating evidence is entirely consistent with that observation. The jury is permitted to consider mitigating evidence relating to the defendant's character and background precisely because that evidence may arouse 'sympathy' or 'compassion' for the defendant.

Id., at 1083. In addition, the Court declared that "if a mitigating circumstance or an aspect of the defendant's background or his character called to the attention of the jury by the evidence of its observation of the defendant arouses sympathy or compassion such as to persuade the jury that death is not the appropriate penalty, the jury may act in response thereto and opt instead for life [imprisonment]. Id., at 1084.

As a result of the foregoing reasoning, the California Supreme Court held that the trial court erred in instructing the jury that they were not to base their verdict on "sympathy" for the defendant.

In Tennessee, an absolute-type anti-sympathy instruction is included in the pattern jury instructions used by trial judges to charge juries in death penalty cases. T.P.I. Crim. 20.03 at p. 218 provides in pertinent part that "The jury in no case, should have any sympathy or prejudice or allow anything but the law and evidence to have any influence upon them in determining their verdict ...." (Emphasis added). Thus, in violation of federal constitutional law, Tennessee juries are admonished at the outset not to let sympathy enter as a factor during their deliberations.

T.C.A. §39-2-202(b), provides that a person convicted of Murder in the First Degree shall be punised by death or by imprisonment for life. In arriving at this determination, Tennessee juries are instructed that "[they] are authorized to weigh and consider any mitigating circumstances and any of the statutory aggravating circumstances which may have been raised by the evidence throughout the entire course of [the] trial, including the guilt finding phase or the sentencing phase or both ...." See, T.P.I. Crim. 20.03, at p. 211. Then follows a list of statutory aggravating circumstances, and a list of mitigating circumstances. However, at no point in the instructions are the terms "aggravating circumstances" and "mitigating circumstances" defined. The enumerated items in the instructions are merely examples of what those respective terms represent. This shortcoming gives rise to increased confusion, ambiguity, and a lack of adequate guidance to a sentencing body considering the imposition of the ultimate punishment. It also violates the increased need for reliability in determining whether death is the appropriate punishment in a specific case. Woodson v. North Carolina, 428 U.S. 280, 305 (1976). In addition, it echoes the warning provided by Justice O'Connor in Eddings v. Oklahoma, that "Woodson and Lockett require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by [the sentencing body in imposing a judgment of death]". 455 U.S. at 119.

Although Tennessee juries are instructed that they have the duty to consider any aspect of the defendant's character of record, or any aspect of the circumstances of the offense favorable to the defendant which is supported by the evidence, they are also commanded to avoid "any sympathy" when considering that evidence. However, under federal constitutional law, sympathy is an important ingredient in understanding and appreciating mitigating evidence of a defendant's background and character. Lockett v. Ohio, 438 U.S. 586 (1970); Eddings v. Oklahoma, 455 U.S. 104 (1982). Thus, at best, Tennessee juries receive conflicting instructions.

In California v. Brown, 479 U.S. 538 (1987), the United States Supreme Court confronted a jury instruction similar, although not identical, to T.P.I. - Crim. 20.03. The trial judge in Brown instructed the jury that it must not be swayed by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling". Id., at 542. The defendant challenged the "sympathy" portion of the instruction, arguing that it interfered with the jury's consideration of mitigating evidence.

The Court, in a five to four decision, upheld the instruction, principally relying upon the word "mere" that modified the word "sympathy" in the instruction. The Court opinioned, By concentrating on the noun 'sympathy', respondent ignores the crucial fact that the jury was instructed to avoid basing its decision on mere sympathy". Id. (emphasis in original). The Court concluded that a reasonable juror would "understand the instruction not to rely on 'mere sympathy' as a directive to ignor only the sort of sympathy that would be totally divorced from the evidence adhered during the penalty phase". Id.

In Parks v. Brown, 860 F. 2d 1545 (10th Cir. 1988), the Court of Appeals reversed the appellant's death sentence on the grounds that the anti-sympathy portion of the jury instructions violated the appellant's Eighth Amendment rights by creating an impermissable risk of influencing the jury to discount mitigating evidence. The instruction provided, in pertinent part: "You must avoid any influence of sympathy, sentiment, passion, prejudice or other arbitrary factor when imposing sentence." The Parks Court, applying the "reasonable juror" standard of review, Francis v. Franklin, 471 U.S. 307, 315-16 (1985); California v. Brown, 479 U.S. 538, 541 (1987), concluded that the possibility that the appellant's jury conducted its task improperly was great enough to reguire resentencing.

The Parks Court, in reaching its conclusion, analyzed the facts in the case as follows:

> The anti-sympathy instruction before us is not modified by the word 'mere', which the Court in Brown considered 'crucial' to its decision to uphold the instruction. Rather, the instruction in this case commands the jury to disregard 'any' influence of

> sympathy. Therefore, unlike the instruction in Brown, this all-inclusive anti-sympathy instruction carries with it the danger of leading the jury to ignore sympathy that is based on the mitigating evidence. Consequently, it cannot receive the saving interpretation given in Brown that the jury should exclude only 'the sort of sympathy that would be totally divorced from the evidence'. The Court in Brown, by stressing that the instruction there reasonably could be construed as precluding only 'extraneous emotional factors' that were 'totally divorced from the evidence', [citation], implicitly suggested that sympathy that is based on the evidence is a valid consideration in sentencing that cannot constitutionally be precluded.

Parks v. Brown, 860 F. 2d at 1553.

In addition, the Parks Court observed that: "[A]lthough the word 'sympathy' was buried in the middle of seven factors in Brown, in this case it was first on the list of only four impermissible factors and it was preceded by the adjective 'any'. Therefore, it [was] more likely ... that a juror would notice and be affected by the anti-sympathy portion of the instruction". Id., at 1554.

Thus, based on the foregoing analysis, the Parks Court held that "an absolute anti-sympathy instruction presents an impermissible danger of interfering with the jury's consideration of proper mitigating evidence". Id., at 1557. Moreover, the holding affirms the principle that the death penalty can be constitutionally imposed only if the procedure assures reliability, "under Eighth Amendment standards", in the determination that " 'death is the appropriate punishment in a specific' ". Lockett v. Ohio, 438 U.S. 586, 601 (1978), quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

Relying upon the United States Supreme Court's decision in California v. Brown, supra, the Supreme Court of Tennessee upheld this State's anti-sympathy instruction embodied in T.P.I. - Crim. 20.03.

In State v. Porterfield, 746 S.W. 2d 441 (Tenn. 1988), the Tennessee Supreme Court held that the trial court did not err in instructing the jury that they must not allow sympathy to influence them in reaching their verdict. Id., at 450. This holding was rendered notwithstanding the fact that the Tennessee anyt-sympathy instruction is distinguishable from the instruction which formed the basis for the decision in Brown.

The factual circumstances surrounding the anti-sympathy instruction delineaated in T.P.I. - Crim. 20.03, closely parallel the facts which surrounded the challenged instruction in Parks. Namely, T.P.I. - Crim. 20.03, mandates an absolute ban on any form of sympathetic consideration by the jury. In addition, the Tennessee instruction is not modified by the word "mere", which the Brown Court considered "crucial" t its decision to uphold the instruction. Rather, T.P.I. - Crim. 20.03, commands the jury to disregard "any" sympathy during its deliberations. Furthermore, the word "sympathy" is first on the list of several impermissible factors and it is preceded by the adjective "any". Therefore, it is more likely ... that a juror would notice and be affected by the anti-sympathy portion of the instruction." Parks v. Brown, 860 F. 2d 1545, 1554 (10th Cir. 1988). Accordingly, it is reasonable to assume that T.P.I. - Crim. 20.03's "all-inclusive anti-sympathy instruction carries with it the danger of leading the jury to ignore sympathy that is based on the mitigating evidence. Id., at 1553.

"Mitigating evidence about a defendant's background or character is not limited to evidence of guilt or innocence, nor does it necessarily go to the circumstances of the offense. Rather, it can include an individualized appeal for compassion, understanding, and mercy as the personality of the defendant is fleshed out and the jury is given an opportunity to understand, and to relate to the defendant in normal human terms." Id., at 1555.

In Witherspoon v. Illinois, 391 U.S. 510 (1968), the Court observed that "one of the most important functions any jury can perform" in exercising its discretion to choose "between life imprisonment and capital punishment" is "to maintain a link between contemporary community values and the penal system". Id., at 519, and n. 15. However, the performance of this function is aborted when the jury is formally precluded, by an anti-sympathy instruction, from responding emotionally to mitigating evidence. As a result, the link between contemporary community values and the penal system is broken.

In California v. Brown, 479 U.S. 538 (1987), Justice O'Connor, in her concurring opinion upholding the "mere sympathy" instruction, observed that a risk of "[attempting] to remove emotion from capital sentencing" is that such attempts may mislead jurors "into believing tha mitigating evidence about a defendant's background or character also must be ignored". Id., at 545-46. However, "[w]hen the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments". Lockett v. Ohio, 438 U.S. 586, 605 (1978). Therefore, the accused contends that the anti-sympathy portion of T.P.I. - Crim. 20.03, violates his Eighth and Fourteenth Amendment rights by creating an impermissible risk of influencing the jury to discount mitigating evidence which he may have to present.

CONCLUSION

Controlling decisions of the United States Supreme Court not only permit, but mandate freedom on the part of the jury to act on the basis of sympathy or compassion when that sympathy is a reaction to evidence regarding the defendant's character or background. Therefore, the accused prays that this Honorable Court will apply a high degree of scrutiny in assessing and evaluating his request that the jury be instructed that it may consider sympathy, based upon the evidence presented, if his trial proceeds to the sentencing phase.

Respectfully submitted,

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been delivered to the Office of the District Attorney General this the 4 day of March, 1998.

RONALD JOHNSON
ATTORNEY FOR THE ACCUSED

2515B/105-112

Assistant District Attorney General

IN THE CRIMINAL COURT OF TENNESSEE
THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS

Division Six

STATE OF TENNESSEE

vs INDICTMENT: 98-01033-34

Michael D. Rimmer

STATE'S RESPONSE TO MOTION OF DEFENDANT
FOR THE COURT TO INSTRUCT THE JURY THAT IT MAY CONSIDER SYMPATHY
IN REACHING ITS VERDICT DURING THE PENALTY PHASE OF THE TRIAL

Comes now the State of Tennessee, by and through the undersigned Assistant District Attorney General, and for answer to the Motion for the Court to Instruct the Jury That it May Consider Sympathy In Reaching its Verdict During the Penalty Phase of the Trial, would respectfully show unto the Court as follows:

1. Defendant has not cited authority which would warrant instructing the jury that it may consider sympathy.

2. Defendant merely states, without proper citation, that on two occasions the U.S. Supreme Court has ruled that the jury cannot be precluded from considering "as a mitigating factor, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."

3. The State of Tennessee submits that sympathy is not an aspect of the defendant's character or record nor is it one of the circumstances of the offense. Accordingly, defendant's motion is invalid on it's face.

4. Tennessee Pattern Jury Instructions specifically admonish the jury from considering sympathy in marking their decisions. An instruction that the jury may consider sympathy would increase confusion and ambiguity.

5. The Tennessee Supreme Court has repeatedly held that evidence is relevant to the penalty phase only if it is relevant to prove or disprove the existence of statutory aggravating circumstances or mitigating factors. STATE V. BLACK, 815 S.W. 2d. 166, 179 (Tenn 1991), STATE V. PORTERFIELD, 746 S.W. 2d. 441, 449 (Tenn. 1988), STATE V. COZZOLINA, 584, S.W. 2d. 765, 768 (Tenn. 1979). Sympathy is not relevant to the factors to be consider by the jury or to a fair and impartial proceeding.

Wherefore, the State respectfully requests that the Court deny the Motion to Video Tape Trial.

Respectfully submitted,

Thomas D. Henderson
Assistant District Attorney General

CERTIFICATE OF SERVICE

This is to certify that a true and exact copy of the foregoing response was caused to be delivered to Public Defender, counsel for the defendant, on March 9, 1998.

Thomas D. Henderson
Assistant District Attorney General